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FEDERAL COMMUNICATIONS COMMISSION REPORTS
(100 F.C.C. 2d)

Decisions, Reports, Public Notices, and Other Documents of
the Federal Communications Commission of
the United States

VOLUME 100 (2d Series)
Pages 1119 to 1628

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NOTE: The index to this pamphlet includes alphabetized document titles and other descriptive data accumulated from previous and current issues in this particular volume. Refer to pages shown on the cover of the pamphlet to distinguish which documents are available in this issue.

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Subject Digest

Agreement Between Applicants

Settlement agreements between low power television or television translator applicants which provide for the amendment and reinstatement of a low power television or television translator application previously returned as defective will not be considered or approved.
—*Howard LP TV, Inc.*

Anticompetitive Practice, Common Carrier

Violations found of Sec. 214(a) of Communications Act and Sec. 63.54 of Commission's Rules because telephone company constructed cable television systems within its service areas without Commission authorization. Divestment of all prohibited interests ordered. Notice of apparent liability for forfeiture issued. Parties ordered to attempt negotiated settlement of damages issue. Commission found it lacks authority to award attorney fees and that complainant did not show FCC authority to award punitive damages.
—*Comark Cable Fund III*

Appeal, Procedural Requirements

Review Board dismisses appeal because applicant has not demonstrated compliance with Section 1.301 of the Commission's Rules.
—*Horizon Community B/cers, Ltd.*
MM Docket No. 84-1031

Application, Processing of

The predicted contour of a full service television station authorized by construction permit is protected from interference in low power television and television translator application processing for the duration of the permit.
—*Neighborhood TV Co., Inc.*

(See also: Agreement Between Applicants-*Howard LP TV, Inc.*)

Broadcasting, Re-Regulation

Report and Order adopted deleting rule specifying maximum durations of horizontal and vertical blanking intervals transmitted as part of video signal by television b/c stations. Technical standards have been established for the video and audio signals transmitted by television b/c stations to ensure compatibility with television receivers marketed to the public. Standards that no longer serve a useful regulatory purpose deleted.
—*Television Standards*
BC Docket No. 79-145

CATV Cable TV Relay Service (CARS)

Commission has implemented a single-step licensing process and eliminated or streamlined several filing and reporting requirements related to authorization applications, annual reports, and transfers of assignment or control for stations in the Cable Television Relay Service. These changes serve to expedite processing, thereby reducing costly regulatory delays and reporting burdens.

—*Amendment of Part 78*

MM Docket No. 84-886

CATV Cars Band

(See: CATV Cable TV Relay Service (CARS)-*Amendment of Part 78*)

CATV Program Exclusivity, Network Programming

Request for waiver of Section 76.92 of the Commission's Rules granted. Petitioner demonstrated projected audience loss to station would not adversely impact licensee's ability to operate in the public interest.

—*COMMUNITY TELE-COMMUNICATIONS INC.*

CATV Special Relief

(See: CATV Program Exclusivity, Network Programming-*Community Tele-Communications Inc.*)

Cellular Communications Systems

Initial Decision affirmed granting cellular nonwireline application where one applicant's proposed system covering more area and population and its slight preferences for its expansion plan overcomes opponents' slight preferences for demand assessments, service proposals and rate levels.

American Mobile Communications

-CC Docket No. 83-445

Character Qualifications

Commission reverses Review Board and finds renewal applicant preferred on comparative grounds over mutually exclusive applicants. Renewal expectancy granted based on most recent license term although incumbent's renewal application held in deferred status for extended period. Misconduct at co-owned station warrants only slight demerit in view of incumbent's remedial measures, nonrecurrence of misconduct, and deterrent impact of losing co-owned stations.

United Broadcasting Co., Inc.

BC Docket No. 80-479

Review Board declined to award dispositive Section 307(b) preference in comparative FM broadcast proceeding and awarded grant to applicant with 100% full-time ownership integration proposal enhanced by minority and female status and previous broadcast experience. Slander character demerit assessed against one loser and two applicant's undefined managerial role given only slight integration credit. Official notice not taken of application language omitted from hearing exhibit. Diversification demerit assessed for failure to timely supply exculpatory data.
Voce Intersectario Verdad Amer. Inc.
MM Docket No. 83-765

Common Carrier
Memorandum Opinion and Order adopted which reconsiders, and upholds, the Length of the transition period and length of price increase intervals for the multi-line business leasing program established as part of detariffing of AT&T's embedded customer premises equipment.
Customer Premises Equipment
CC Docket No. 81-893
Memorandum Opinion and Order adopted reconsidering the *First Report and Order* in CC Docket No. 81-893, 95 FCC 2d 1276 (1983). Commission examined the termination charge provisions of CPE lease contracts transferred to AT&T-IS from BOCs and AT&T-IS's termination charge practices, and concluded that neither is inconsistent with the Communications Act or the Commission's previous orders.
—Customer Premises Equipment
CC Docket No. 81-893

Common Carrier, Authorization
(See: Anticompetitive Practice, Common Carrier-*Comark Cable Fund III*)
Notice of Proposed Rulemaking adopted regarding policy and rules concerning rates and facilities authorizations for international competitive common carriers.
Competitive Carrier Policies
CC Docket 85-107

Common Carrier, International
(See: Common Carrier, Authorization-*Competitive Carrier Policies*)
Notice of Proposed Rulemaking adopted requesting comments on the Commission's proposed policy for the distribution of circuits

among North Atlantic cable and satellite facilities during the 1986-1991 period.
—*North Atlantic Telecommunications*
CC Docket No. 79-184

Commission tentatively concludes that construction of a fiber optic transPacific cable as early as 1988 would be in the public interest.
—*Pacific Planning*
CC Docket 81-343

Common Carrier, Negotiation to Avoid Hearing
(See: Anticompetitive Practice, Common Carrier-*Comark Cable Fund III*)

Common Carrier, Rates, Charges
(See: Common Carrier, Authorization-*Competitive Carrier Policies*)

Community Ascertainment of Needs, Sufficiency of
On remand from U.S. Court of Appeal by its own motion, Commission clarified that stations with non-specialized programming remain subject to the same standard as before our Radio Deregulation Order when their programming performance has been challenged namely, when there are specific allegation of fact, which if true, would establish that the licensee's overall programming could not reasonably have met the needs and interest of the people within its service area, including the Black community.
—*B/C Renewals (Ind., Ky., Tenn)*

Community, Minority Faction Making up Separate Service Group
(See: Community Ascertainment of Needs, Sufficiency of-*B/c Renewals (Ind. Ky, Tenn.)*

Comparative Criteria
(See: Cellular Communications Systems-*American Mobile Communications*)

(See also: Character Qualifications-*United Broadcasting Company, Inc.*)

Comparative Hearing
(See: Cellular Communications Systems-*American Mobile Communications*)

Use of two phased comparative proceedings appropriate procedure to permit applicants to establish requisite comparative superiority over other challengers in multiple hearing cases. Deferral of renewal

applicant's comparative qualifications until after its basic qualifications are established in related proceeding does not deny challengers of right to full comparative hearings.
—RKO General, INC. (WYFR-FM)
MM Docket No. 84-1085

Competition, Common Carriers
(See: Common Carrier, Authorization-*Competitive Carrier Policies*)

Construction Permit, Extension of
Where permittee did not commence construction of two TV stations within time permitted and waited until after permits were cancelled to inform FCC that it wanted to assign them, denials of extension application upheld. Decision to assign construction permit should be made as soon as possible so assignee has time to construct without needing to ask for an extension.
—David E. Goff

Where a third application for extension of time to construct TV station is filed, the pendency of an assignment application does not automatically entitle permittee to grant of the extension.
—New Orleans Channel 20, Inc.

Death of legal counsel shortly after grant of TV construction permit is not circumstance beyond permittee's control warranting extension of time, since the permittee must assume responsibility for construction and operation of station. The Commission is now strictly enforcing Section 73.3554(a) of the Rules, and a permittee cannot wait until construction permit is about to expire to proceed with construction.
—Sunrise B/Cing, Inc.

Construction Permit, Transfer of
(See: Construction Permit, Extension of-*David E. Goff*)
(See also: Construction Permit, Extension of-*New Orleans Channel 20, Inc.*)

Control, Concentration of; Regional
Commission affirmed its conclusion in *Report and Order* in MM Docket No. 84-19 that the public interest is best served by elimination of the "regional concentration of control" provisions of multiple ownership rules. Petitions for reconsideration, suggesting several alternatives to repeal of the rule, denied.
—Regional Concentration of Control
MM Docket No. 84-19

Control, Transfer of, Procedures

(See: CATV Cable TV Relay Service (CARS)-*Amendment of Part 78*)

Contour, Interference

In calculating the HAAT of the radiation center of the antenna along pertinent radials the Commission's rules provide that elevations between 2 to 10 miles from the antenna site shall be employed. Commission does not consider terrain shielding in its computer evaluation of low power television and television translator applications, since there is no universally accepted method of predicting the effects of terrain shielding.

—*Arnold N. Applebaum*

Contour, Measurements

(See: Contour, Interference-*Arnold N. Applebaum*)

Cross Interest

(See: Anticompetitive Practice, Common Carrier-*Comark Cable Fund III*)

Customer Premises Equipment

(See: Common Carrier-*Customer Premises Equipment*)

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(See: Anticompetitive Practice, Common Carrier-*Comark Cable Fund III*)

Deregulation

(See: Community Ascertainment of Needs, Sufficiency of-*B/c Renewals (Ind. Ky., Tenn.)*

Diversification of Control of Mass Media

Review Board denies reconsideration of its *Decision*, FCC 85R-23, released March 13, 1985. Contingent integration proposal is not credited comparatively; only those integration proposals which are permanent and have a reasonable likelihood of effectuation are credited. A timely and unconditional divestiture pledge was credited.

—*Northern Sun Corp.*

MM Docket No. 83-1050

(See also: Character Qualifications-*United Broadcasting Company, Inc.*)

(See also: Character Qualifications-*Voce Intersectario Verdad America, Inc.*)

Divestment of Interests

(See: Anticompetitive Practice, Common Carrier-*Comark Cable Fund III*)

Equipment Authorization

Notice of Proposed Rule Making adopted proposing Part 15 of Rules be amended to permit the operation of low power communication devices in the 1.6 to 10 MHz band. Proposed regulations specify which form of equipment authorization should be obtained and which technical standards should be met, prior to use or marketing. They also would allow the operation of wideband swept frequency systems.
—Amendment of Part 15
Gen Docket No. 85-129

Second Report and Order adopted amending Part 15 to add new interim provisions for cordless telephones. An additional requirement calls for a label on the package in which the cordless telephone is marketed, advising prospective purchaser that some cordless telephones respond to radio noise or other nearby units. The label is also required to list the features to protect against such occurrences.
—Amendment of Part 15
Gen. Docket No. 83-325

Order Granting Limited Waiver of FCC Rules Part 15 adopted for a vehicle collision avoidance system. System employs a low power microwave radar and requires a higher signal than the rules presently allow in order for the device to operate in a satisfactory manner. The subject Order grants the requested waiver to allow manufacture of the system for 2 years, after which time it must comply with the current rules.
—Vehicle Radar Safety Systems, Inc.

Field Disturbance Sensor

(See: Equipment Authorization-*Vehicle Radar Safety Systems, Inc.*)

Frequency Assignment, Table of Assignment FM

Action adding FM allotments to 689 communities in accordance with criteria designed to maximize the number of communities and consistent with established allotment criteria for new service.
—FM B/C Assignments
MM Docket No. 84-231

Action proposing allotment of FM channels to five communities as counterproposals to previous proposed allotments upon showings

that counterproposals are consistent with criteria for new FM allotments.
—FM B/c Assignments
MM Docket No. 84-231

Frequency, Equitable Distribution of Under 307(b)
(See: Character Qualifications-*Voce Intersectario Verdad America, Inc.*)

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(See: CATV Cable TV Relay Service (CARS)-*Amendment of Part 78*)

Low Power Communication Devices
(See: Equipment Authorization-*Amendment of Part 15*)

Message Telecommunications Service
Order suspended tariff revisions, proposing to implement an optional calling plan called PRO America. An investigation into the lawfulness of these revisions also instituted. Suspension and investigation based on inadequate cost justification for the filing and indications in the record that PRO America may be priced below cost.
—AT&T Communications
CC Docket No. 85-128

Mobile Radio Service, Cellular Applications
(See: Cellular Communications Systems-*American Mobile Communications*)

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(See: Character Qualifications-*Voce Intersectario Verdad America, Inc.*)

Ownership and Management, Integration of
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(See also: Character Qualifications-*United Broadcasting Company, Inc.*)

(See also: Character Qualifications-*Voce Intersectario Verdad America, Inc.*)

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(See: Community Ascertainment of Needs, Sufficiency of-*B/c Renewals (Ind., Ky., Tenn.)*

Primer, Political B/cing
This Primer is a Commission staff update of the 1978 Public Notice and Primer and contains significant rulings issued by the Commission since 1978. Material which was overruled or superseded has been deleted.
—Political Primer 1984

Primer, Political Cablecasting
(See: Primer, Political B/cing-*Political Primer 1984*)

Qualifications, Comparative
(See: Comparative Hearing-*RKO General, Inc. (WYFR-FM)*)

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(See: CATV Cable TV Relay Service (CARS)-*Amendment of Part 78*)

Rule Making, Petition for
(See: Equipment Authorization-*Vehicle Radar Safety Systems, Inc.*)

Rules, Waiver of
(See: CATV Program Exclusivity, Network Programming-*Community Tele-Communications Inc.*)
(See also: Equipment Authorization-*Vehicle Radar Safety Systems, Inc.*)

Settlement
(See: Agreement Between Applicants-*Howard LP TV, Inc.*)

Specialized Programming
(See: Character Qualifications-*United Broadcasting Company, Inc.*)

Submarine Cable
(See: Common Carrier, International-*Pacific Planning*)

Table of Assignment
(See: Frequency Assignment, Table of Assignment FM-*FM B/c Assignments*)

Tariff, Cost Support Material
(See: Message Telecommunications Service-*AT&T Communications*)

Tariff, Investigation
(See: Message Telecommunications Service-*AT&T Communications*)

Tariff, Suspension
(See: Message Telecommunications Service-*AT&T Communications*)

Telephone Company, AT&T
(See: Common Carrier-*Customer Premises Equipment*)

Television, Low Power
(See: Application, Processing of-*Neighborhood TV Co. Inc.*)

Television Station, Technical Standards
(See: Broadcasting, Re-Regulation-*Television Standards*)

Translator
(See: Application, Processing of-*Neighborhood TV Co. Inc.*)

Equipment Authorization
Low Power Communication Devices
Radio Frequency Device, Authorization

Notice of Proposed Rule Making adopted proposing Part 15 of Rules be amended to permit the operation of low power communication devices in the 1.6 to 10 MHz band. Proposed regulations specify which form of equipment authorization should be obtained and which technical standards should be met, prior to use or marketing. They also would allow the operation of wideband swept frequency systems.
Amendment of Part 15
Gen Docket No. 85-129

FCC 85-212

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

The amendment of Part 15 of the Commission's Rules to permit the operation of low power communication devices in the 1.6-10 MHz band	Gen Docket 85-129 RM-4427

NOTICE OF PROPOSED RULE MAKING

Adopted: April 25, 1985; Released: May 1, 1985

BY THE COMMISSION:

Introduction

1. On April 8, 1983, the Knogo Corporation (Knogo) submitted a petition for rule making,[1] requesting that Section 15.305(c) of the Rules be amended to allocate additional frequencies in the upper MF and lower HF regions of the spectrum for the operation of wideband swept frequency field disturbance sensors (WBSS).[2] The purpose of this proceeding is to

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[1] *See Petition for Rule Making,* RM-4427 (Public Notice, April 19, 1983, Report No. 1401).

[2] A field disturbance sensor is defined in Section 15.4(j) of the Rules as a restricted radiation device which establishes a radio frequency field in its vicinity and detects changes in that field resulting from the movement of persons or objects within the radio frequency field. Examples are sensors for automatic door openers in commercial establishments, intrusion detectors, and anti-shoplifting equipment for retail stores.

propose solutions to the problems enumerated in the Knogo petition, not only to benefit the petitioner but also to allow other manufacturers a greater use of the spectrum. To the extent possible, we shall also utilize the subject petition as a vehicle to establish provisions for general purpose low power communication devices (LPCDs) operating in the upper MF and lower HF regions of the spectrum. We shall also consider in this proceeding LPCDs which sweep their operating frequencies over a relatively wide bandwidth in comparison with conventional narrow bandwidth equipment.

Characteristics and Performance of Wideband Swept Sensors

2. Wideband swept sensors currently available on the market are usually utilized for security or control applications. WBSS are field disturbance sensors which utilize relatively large bandwidths in comparison to conventional equipment. WBSS are typically composed of two elements: a wafer placed on the monitored article and a transceiver (detector) situated at the entry or exit of the area under surveillance. An alarm is activated when the wafer is brought into the radio fields emanated from the transceiver. The relatively large bandwidths are necessary to assure that the frequency of resonance of the wafer is recognized by the detector, thereby activating the alarm when the wafer is brought near the transceiver. Knogo and its competitors manufacture basically two types of WBSS (1) anti-pilferage systems (or anti-shoplifting detectors) used as a means of detecting attempts to remove protected article from retail stores, libraries, etc. and (2) patient control systems for monitoring the movements of ambulatory patients in hospitals or other health care facilities.

Knogo Petition

3. Knogo contends that the present Rules covering WBSS hinder technological innovation because at frequencies above 1 MHz (with the exception of three bands for which the technical standards have been relaxed by the Commission in a previous proceeding) it becomes difficult to achieve compliance.[3,4] By limiting operation to only three frequency bands, Knogo states that manufacturers are prevented from developing devices which might function more efficiently at other frequency ranges. For example, at 3.25 MHz the efficiency of the antenna and the wafer can be increased. Consequently, a 3.25 MHz system performs better overall

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[3] *See* 47 C.F.R. § 15.305(a) which prescribes a field strength limit of 15 uV/m at a distance of $\lambda/2\pi$ in meters.

[4] *See Report and Order* in General Docket No. 20620, 65 FCC 2d 802 (1977) (dealing with the operation of wideband swept RF equipment used as anti-pilferage devices). Special provisions were adopted for the operation of WBSS for the following three bands: 2.0 ± 0.3 MHz, 4.5 ± 0.45 MHz, and 8.2 ± 0.80 MHz.

when operated with the same field strength levels as those produced by 2 MHz equipment, and the number of false alarms can thus be considerably reduced. In particular, Knogo states that to avoid interference with its competitors systems, which utilize the 4.5 MHz and 8.2 MHz bands, it must restrict the design of its systems to the 2 MHz band. Knogo feels that the limited available frequencies inhibit its sales.

4. A short term solution to this problem, Knogo suggests, would be to allow operation on one or two more frequencies in the 2 to 10 MHz band. In addition, Knogo maintains that giving manufacturers the option of using any frequency from 2 to 10 MHz would be a more adequate solution on a long term basis, especially in view of the rapid growth of the alarm industry. Knogo asserts that the present technical regulations set out in Sections 15.321 and 15.323 of the Rules are adequate for operation anywhere within the 2 to 10 MHz band.

Comments and Discussion

5. No opposition to the petition has been received, except from James Weitzman, an amateur radio operator. Mr. Weitzman contends that the use of WBSS in the frequency range in question would be a considerable source of interference to the international broadcasting and amateur radio services. Mr. Weitzman views the allocation of additional frequencies basically as an inappropriate solution to Knogo's problems, a request for an exclusive allocation, and a waste of the HF spectrum. We cannot agree with Mr. Weitzman's allegations, especially since they are not supported either by any interference study or by the Commission's records. Further, the rules regarding [Part 15] RF devices were established by the Commission to protect those radio services, which are authorized under 47 C.F.R. § 2.106 from receiving harmful interference. Thus, any action taken by the Commission with regard to Part 15 devices does not supersede the rights vested to the services which have been recognized in the table of frequency allocations.

6. The purpose of the electromagnetic interference (EMI) standards under Part 15 is to allow a greater use of the spectrum on a non-interference basis to authorized radio services. This policy is maintained in this proceeding by extending the scope of the subject petition to cover the operation of general purpose low power communication devices, (including ones which utilize swept frequency techniques), into the upper MF and lower HF regions of the spectrum. While Knogo requests that rules be adopted for a specific device, we find no valid reason for limiting our proposal to permit only the use of WBSS. Such action is made in light of the fact that the present Part 15 rules do not have any provisions for general purpose LPCDs operating in the upper MF and lower HF regions of the spectrum above 1.6 MHz, and because other manufacturers besides Knogo have also shown an interest in designing LPCDs in this frequency

range.[5] Also we recognize that the technical standards for LPCDs operating above 1 MHz are intentionally restrictive.[6] For the purpose of this proceeding, we are proposing to relax the technical standards for LPCDs only in the 1.6 to 10 MHz range. We have only been able, at this point, to gather significant data on devices operating within that range. Further, the subject petition, to some extent, follows earlier consideration of the technical standards for LPCDs operating above 1.6 MHz.[7] Finally, no reports of interference to radio services susceptible of receiving interference (amateur, international broadcasting, fixed, maritime mobile, aeronautical mobile, etc.) from LPCDs operating in portions of the HF region of the spectrum have been brought to the attention of the Commission. It should be noted that no interference reports from the operation of LPCDs in the 1700-2300 kHz band to safety services using the frequency 2182 kHz have been received. Comments concerning the need to restrict the use of such devices from operating in portions of the 5 and 8 MHz bands (including those operating at 2182, 5176.5, 5680, 8241.5, and 8765.4 kHz) to protect safety services are requested.

7. We believe that broadening the scope of this proceeding will encourage technological innovation, reduce the need for costly and unwarranted rule making procedures, and assist us in solving the technical problems stated by Knogo. We feel that such action will assist manufacturers in finding new applications and in improving the efficiency of systems such as wideband swept sensors. Possible applications could be in the field of data collection and transmission, telemetering, identification systems, campus radio stations, drive-in theaters, control and security, etc. The technical requirements which we propose to adopt in this proceeding are flexible enough so that any modulation technique may be used; the field strength limits chosen at the fundamental or within the specified band are at least 10 dB below typical manmade radio noise levels from 1.6 to 10 MHz in business, residential, and rural areas, assuming free-space propagation.[8] This should provide a sufficient safety margin to preclude any interference to the licensed radio services which operate at power levels far greater that the man-made radio noise levels within the frequency range in question.

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[5] *See Order Granting Waiver in Part*, FCC 81-322, released July 21, 1981, (dealing with the operation of a low power communication system at 2.5 and 6.0 MHz for the purpose of identifying individual cows).

[6] *See* Section 2.5 of FCC/OST Bulletin 63, "Understanding FCC Rules & Regulations under Part 15 for Low Power Transmitters", (December 1984).

[7] *See Notice of Proposed Rule Making* in Gen. Docket 20780, FCC 76-347, 41 Fed. Reg. 17938 (1976).

[8] *See* CCIR (International Radio Consultative Committee) Report No. 258-4, "Man-made Radio Noise", (1982).

8. General concurrence on the matter has been obtained from the Interdepartment Radio Advisory Committee (IRAC), which oversees Federal governmental use of the spectrum, with the understanding that only swept frequency LPCDs with a minimum frequency sweep of ± 5% of the fundamental will be allowed. The National Telecommunications and Information Administration (NTIA) in a report to IRAC voiced concerns about allowing stationary or narrowband signals in the lower HF region of the spectrum. NTIA suggests that imposing a minimum sweep rate will minimize the interference potential to government aeronautical, maritime mobile and other services. The question of allowing stationary or narrowband signals in the 1.6 to 10 MHz range is still being discussed with NTIA. Meanwhile we solicit comments from the public on allowing the operation of any type of LPCD from 1.6 to 10 MHz, and also on the future possibility of adopting technical standards for the operation of LPCDs above 10 MHz. In particular, we request information on possible applications and power levels necessary to achieve efficient operation for LPCDs above 10 MHz. We wish to point out, however, that EMI standards under Part 15 are not meant to prevent multiuser interference problems[9] and the standards which are proposed in this proceeding will not necessarily alleviate the multi-LPCD user interference problems encountered by Knogo.

Proposed Rules

9. In summary, we propose to amend Part 15, Subpart D of the Rules, in accordance with the above discussion, to permit the operation of any LPCD from 1.6 to 10 MHz which meets the technical requirements specified in the Appendix. A field strength limit of 100 uV/m at a distance of 30 meters would apply to the emissions within the swept frequency band or the fundamental frequency. Maximum permissible field strength levels of the harmonics, out-of-band, and/or spurious emissions would be the same as those currently prescribed for Class B computing devices. Since different types of devices would be permitted to operate under the new rules, we must take into account the possibility that some systems will be utilized in residential areas and possibly interfere with the operation of AM receivers. To minimize this possibility, we are proposing the same conduction limits which are currently imposed for Class B computing equipment for any LPCD connected to the public power lines, i.e. 250 uV from 450 kHz to 30 MHz.[10]

10. Any measurement procedure acceptable to the Commission may be used. Applicants filing for equipment authorization with the Commission are advised to consult with the FCC laboratory to discuss their

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[9] *See* 47 C.F.R. § 15.3.

[10] *See* 47 C.F.R. §§ 15.830 and 15.832.

procedure, prior to submitting their reports of measurements. For purposes of this proceeding, we propose that for swept frequency equipment, the measurements be made with the frequency sweep halted and a peak reading field strength meter. Radiated emissions measurements should be made on an open field site.[11] We request comments on the technical requirements proposed, and in particular, the permissible emission levels, and the advantages/disadvantages of making measurements with the sweep halted or enabled for swept frequency devices. Low power communication devices operating in the 1.6-10 MHz band shall be certificated pursuant to the relevant sections of 47 C.F.R. Part 2, Subparts I and J. Certification and the implementation of a sampling program should deter the marketing of noncomplying devices.

Procedural Matters

11. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 601 *et seq.* the Commission issues the following initial regulatory flexibility analysis:

I. Reason for action

This proceeding is in response to a petition for rule making requesting that additional frequencies be allowed for the operation of wideband swept frequency field disturbance sensors.

II. The objective

The objective of this proceeding is to enhance the use of new technology for low power communication devices in the 1.6-10 MHz band without increasing the interference potential to authorized radio services.

III. Legal basis

The action proposed is in accordance with Sections 4(i), 302(a), 303(g), and 303(r) of the Communications Act of 1934, as amended, which permit the Commission to make reasonable regulations governing the interference potential of radio frequency equipment and to promote the larger and more effective use of radio in the public interest.

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[11] *See* FCC/OST Bulletins such as MP-1, "FCC Methods of Measurements for Determining Compliance of Radio Control and Security Alarm Devices and Associated Receivers", (February 1983), and MP-4, "FCC Methods of Measurements of Radio Noise Emissions from Computing Devices", (December 1983), to the extent practicable, may be used as guidelines. *See also* FCC/OST Bulletin 55, "Characteristics of Open Field Test Sites", (August 1982).

IV. Entities affected; nature of economic impact; significant alternatives

This action is expected to have a beneficial economic impact on manufacturers since it will allow greater design flexibility. No significant alternatives are apparent at this time.

V. Recording, record-keeping and other compliance requirements

None beyond that required under the existing regulations.

12. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rule making until the time that a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's Rules.

13. Pursuant to the applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before June 24, 1985, and reply comments on or before July 9, 1985. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N. W., Room 239, Washington, D.C. 20554. For further information on this

proceeding, contact Liliane M. Volcy, Office of Science & Technology, (202) 653-8247.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

Part 15 of the FCC Rules (47 C.F.R. Part 15) is amended as follows:

1. The current Section 15.115 is deleted and the current Section 15.114 is re-identified as Section 15.115.

2. A new Section 15.114 is added to read as follows:

Section 15.114 Operation between 1.6 and 10 MHz (including swept frequency).

A low power communication device, including one which utilizes swept frequency techniques, may be operated in the 1.6 to 10 MHz band provided it meets the following requirements:

(a) Operation shall be confined to the 1.6 to 10 MHz band.

(b) The field strength of the emissions within the swept frequency band or the fundamental frequency shall not exceed 100 uV/m at 30 meters.

(c) The field strength of the harmonics, out-of-band, and/or spurious emissions shall not exceed:

Frequency Range (MHz)	*Distance (meters)*	*Field Strength (μV/m)*
below 88	30	10
88 to 216	30	15
above 216	30	20

(d) A low power communication device which is designed to be connected to a public utility power line shall limit the radio frequency voltage conducted back into the power lines to values below 250 uV between 450 kHz and 30 MHz.

3. Paragraph (a) of Section 15.141 is amended as follows:

Section 15.141 Measurement procedure.

(a) Any procedure acceptable to the Commission may be used to measure the RF energy emitted or conducted by a low power communication device. For swept frequency equipment, measurements shall be made with the frequency sweep stopped using a field strength meter with a peak reading detector. Radiated emission measurements shall be made, to the extent possible, on an open field site.

4. The table in Section 15.142 is amended to read as follows:

Section 15.142 Range of measurements.

Frequency band in which the device operates	*Frequency range of measurements*	
	Lowest frequency	*Highest frequency*
Below 1600 kHz	10 kHz	20MHz
1.6 to 10 MHz	Lowest frequency gathered in the device	300MHz
26.97 to 27.27 MHz	Lowest frequency generated in the device	400 MHz
40.66 to 40.70 MHz	Lowest frequency generated in the device or 25 MHz, whichever is lower	1000 MHz
49.82 to 49.90 MHz	Lowest frequency generated in the device or 25 MHz, whichever is lower	1000 MHz
70 to 108 MHz	do	1000 MHz
108 to 500 MHz	do	2000 MHz
500 to 1000 MHz	Lowest frequency generated in the device or 100 MHz, whichever is lower	5000 MHz
Above 1000 MHz	Lowest frequency generated in the device or 100 MHz, whichever is lower	tenth harmonic or highest frequency generated

5. Paragraph (c) of Section 15.305 is revised to read as follows:

Section 15.305 General technical specifications.

* * * * *

(c) A field disturbance sensor, as an alternative to paragraphs (a) and (b), may be operated under the provisions of Sections 15.114, 15.141, and 15.142 of this chapter.

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6. Sections 15.321 and 15.323 are deleted.

Equipment Authorization
Low Power Communication Devices
Radio Frequency Device, Marketing

Second Report and Order adopted amending Part 15 to add new interim provisions for cordless telephones. An additional requirement calls for a label on the package in which the cordless telephone is marketed, advising prospective purchaser that some cordless telephones respond to radio noise or other nearby units. The label is also required to list the features to protect against such occurrences. *Amendment of Part 15*
Gen. Docket No. 83-325

FCC 85-277

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the matter of Amendment of Part 15 to add new interim provisions for cordless telephones	General Docket No. 83-325 RM-4062 RM-4075

SECOND REPORT AND ORDER

Adopted: May 20, 1985; Released: June 5, 1985

BY THE COMMISSION:

1. A *Report and Order* in this docket was adopted on December 22, 1984,[1] establishing interim provisions for cordless telephones in 47 CFR 15.231-7. On May 17, 1984, the Commission adopted a *Further Notice of Proposed Rulemaking* (hereinafter Further NPRM) in this proceeding,[2] proposing an additional labelling requirement for cordless telephones to inform consumers of the features designed to prevent others from dialing calls through their unit. A list of the parties that filed comments in response to the Further NPRM can be found in the attached Appendix A.

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[1] The *Report and Order* in General Docket 83-325 was adopted on December 22, 1984, released January 10, 1984, 49 FR 1512, January 12, 1984.

[2] The *Further Notice of Proposed Rulemaking* in General Docket 83-325 was adopted on May 17, 1984, released May 23, 1984, 49 FR 23397 June 6, 1984.

This Second Report and Order establishes such a labelling requirement. This document also addresses a petition filed by GTE Service Corporation requesting clarification of certain technical requirements pertaining to cordless telephone transmitters.

2. Cordless telephones utilize a two-way radio link in place of the wire utilized by conventional telephone handsets. This allows the user freedom of movement when talking on the telephone. Each cordless telephone in fact consists of two pieces of equipment: a portable handset and a base unit that connects to the telephone line. In the initial Notice of Proposed Rulemaking in this docket, the Commission proposed a requirement that all cordless telephones have some minimal means of preventing the base unit from either being engaged by an outside party or unintentionally going off-hook and seizing local telephone network loops. Cordless telephone manufacturers generally refer to such features as "security" features.[3] The proposal stemmed from a concern expressed by GTE, which operates telephone systems, about the possibility of cordless telephones responding to signals other than those from the associated handset, resulting in calls being dialed or the telephone going off-hook without the owner's intention. This could occur as a result of intentional theft of service, inadvertent interaction with another nearby cordless telephone, or inadvertent responses to radio noise. Consequently, the owner of the cordless telephone may be charged for calls that were made without his knowledge. GTE contended that this situation posed a potential problem for telephone companies, both because of the potential lost revenue from unpaid bills and because of telephone switching equipment being tied up by cordless telephones in the off-hook condition.

3. In the *Report and Order* in this docket, the Commission stated that it had found insufficient evidence that a minimal design requirement for cordless telephone security features was needed. The decision was based on a number of factors, as detailed in paragraphs 25 through 27 of the *Report and Order*. Chief among them were the following: marketplace forces had already brought about security features on most cordless telephones; little evidence had been submitted of actual costs to telephone companies caused by inadequate cordless telephone security features; and, the degree of security protection needed varies for each consumer depending, among other things, on whether the cordless telephone will be used in an area of high or low population density. The Commission found it preferable to allow the consumer to decide the degree of security

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[3] The term "security," as used here, does not refer to the ability to prevent someone from monitoring conversations. Privacy of conversation is not ensured when using a cordless telephone. Section 15.236, 47 CFR 15.236, requires that each cordless telephone base unit carry a label to this effect. See paragraphs 33 and 34 of the *Report and Order* in this docket.

protection he requires and cost he is willing to pay rather than prescribing minimal design requirements for cordless telephone security systems, which would provide insufficient security in high density urban environments and unneeded security in low density rural environments. In addition, the Commission was concerned that consumers might be misled into believing they were buying a telephone that was immune to security problems because it met FCC standards, when in fact the minimal security obtained would not have alleviated security problems in many circumstances.

4. In the Further NPRM, the Commission proposed a labelling requirement whereby the consumer would be informed of the security features possessed by the cordless telephone he or she plans to purchase. The proposed requirement called for the box or other package in which the cordless telephone was marketed to carry a statement in a prominent location which reads as follows:

> CAUTION: The base unit in this cordless telephone may respond to other nearby units or radio noise, resulting in telephone calls being dialed through this unit without your knowledge and, possibly, calls being misbilled. In order to protect against such occurrences this cordless telephone is provided with the following features: [to be completed by the manufacturer].

The complete text of the label along with where, specifically, it would appear on the package, were to be stated in the application for certification of the cordless telephone.

5. Electronic Industries Association (EIA), representing cordless telephone manufacturers, as well as General Electric, and Dynascan, question the need for the labelling requirement, noting that the proposal stemmed from experiences with cordless telephones produced prior to the adoption of the new interim provisions for cordless telephones. Manufacturers provide no specific information as to how security features have changed since the adoption of the new rules. If the Commission should choose to move forward with the requirement, the manufacturers suggest some minor modifications of the text of the label to make it less harsh.

6. The other respondents generally support the proposal. However, the New York City Department of Consumer Affairs and Associated Public-Safety Communications Officers, Inc. (APCO), indicate that they believe stronger action may be needed. The New York City Dept. of Consumer Affairs suggests that protection against theft of service should be viewed as the consumer's fundamental right, and therefore, the Commission should move forward with a minimum design standard. APCO is concerned about the potential effects of inadequate cordless telephone security on 9-1-1 emergency response networks. APCO is a national association representing the interests of the public safety land mobile radio community. Its almost 5,000 members are drawn from police, fire, emergency medical, highway maintenance, forestry conservation,

local government, and defense and disaster agencies throughout the country. APCO explains that for the past 2 years 9-1-1 systems have been plagued with an increasing number of "drop offs," unexplained telephone calls where no one is on the other end when the call is answered. Through the use of enhanced 9-1-1 systems, which automatically return the incoming call for confirmation purposes, APCO has found the source of many of the calls to be cordless telephones.

7. As a result of its growing awareness of this problem, the APCO 9-1-1 Emergency Number Committee has begun a process of alerting public safety agencies with 9-1-1 systems of possible problems caused by cordless telephones. The Committee is attempting to collect more information from agencies experiencing "drop offs" so that the scope and causes of the problem can be accurately assessed. Until this is accomplished, APCO states that it is not in a position to recommend a specific course of action to the Commission. However, APCO urges the Commission to immediately expand the scope of this proceeding to thoroughly study the emerging problem of cordless telephone interference to the nation's 9-1-1 systems.[4]

8. Some of the commenters oppose or raise questions about various details of the proposal. Bellsouth states that it takes orders over the telephone and ships in unmarked cartons to prevent theft. It therefore suggests that the manufacturer be permitted to put the required statement in the instruction manual or in the shipping carton. AT&T replies that the problem alleged by Bellsouth can easily be overcome by using wrapping-paper. Noting that the proposal did not address the question of how much time would be allowed before the new requirement became mandatory, several commenters urge that the requirement apply only to cordless telephones manufactured at least 120 days after the rule is adopted. EIA opposes review of the manufacturer description of the cordless phone's security features as part of the certification process. Also, EIA requests that no supplemental filing be required for cordless telephones which have already been certificated.

Commission Decision Regarding Cordless Telephone Security

9. We believe that the public interest would be served by adopting the proposed labelling requirement, with some modifications in line with the comments. Based upon our review of the literature on the cordless

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[4] One telephone company contacted the Commission staff to advise that it has been experiencing a rash of complaints from people with low digit telephone numbers who are receiving calls where no one is on the other end of the line. The company has been advising the complainants that it speculates the problem is being caused by cordless telephones and the only remedy is to change telephone numbers. However, nothing has been submitted by the company to substantiate the problem.

telephones submitted for equipment authorization, it appears that, indeed, a greater proportion of the new generation of cordless telephones include improved security features. Nevertheless, new units continue to be introduced with security features which are inadequate for high density environments. We believe the consumer should be informed as to the potential problem of inadequate cordless telephone security and the means employed by a specific product to deal with this potential problem. In our view, the best means of accomplishing this objective is with an information label. With this information, consumers will be able to make an informed choice. As a consequence, the marketplace should work to provide appropriate security features best suited to the individual consumer's needs.

10. New York City Department of Consumer Affairs' recommendation to move forward with a design requirement fails to address the question of how any design requirement, no matter how well intended, could provide complete assurance against theft of service. APCO may or may not be correct that cordless telephones are unintentionally dialing 9-1-1; however, insufficient information has been submitted to draw a conclusion one way or the other. If, in the future, APCO or others submit statistics showing that cordless telephones are inadvertently dialing 9-1-1, we will revisit this matter.

11. Accordingly, we are amending the rules in Part 15, as shown in the attached Appendix, to require an information label about cordless telephone security to be carried on the box or other package in which the cordless telephone is marketed. The requirement does not pertain to shipping cartons, so this should not pose a problem for those wishing to ship in unmarked cartons. In order to ensure that the requirement will in fact be met, we are requiring that a description of the label and its placement be included with the application for certification. We plan to review this information only to the extent that the requirement for the label is met and that the description is reasonably consistent with the actual features of the cordless telephone. As for cordless telephones which have already been certificated, they will be required to carry the label, but submittal of supplemental information for our certification files is not mandatory. With regard to implementation of the labelling requirement, we are requiring the label for all cordless telephones manufactured after November 1, 1985.

GTE Request for Clarification of Technical Requirements

12. GTE submitted a "Petition for Clarification" of the *Report and Order* in this docket, with regard to the requirements of Section 15.233 concerning transmitter frequency tolerance and emission bandwidth. GTE contends that the regulations are vague with regard to the center point of

the bandwidth of the transmitter frequency. Section 15.232 specifies the carrier frequencies for cordless telephones; paragraph (a) of Section 15.233 places a 0.01% tolerance (plus or minus) on the carrier frequency; Section 15.233(b) defines the bandwidth of a channel as 20 kHz "centered on the authorized carrier frequency." GTE states that the term "authorized carrier frequency" could be construed to include the 0.01% tolerance. With 15 kHz spacing between some cordless telephone frequencies, GTE claims there could be considerable overlap between the signals of two cordless telephones in adjacent channels if one unit is operating at the high end of its permitted band and the other is operating at the low end. To alleviate this alleged problem, GTE suggests that Section 15.233(b) be revised to read "Emission, including frequency tolerance, shall be confined within a 20 kHz band centered on the carrier frequency specified in Section 15.232." No comments were submitted on the GTE petition.

13. GTE's analysis of the potential risk of adjacent channel interference is incomplete. GTE fails to account for the fact that with the low power levels involved, there will be very little energy falling into adjacent channels. Also, the likelihood of two cordless telephones being located near each other, in adjacent bands, with one being at the high end of its channel and the other low, seems unlikely. GTE's suggestion, although seemingly minor in nature, would be tantamount to a severe tightening of the bandwidth requirement. This would likely require redesign of most cordless telephones at considerable cost, if they could even be made to operate. We do not believe the change requested by GTE is warranted and therefore reject GTE's proposition. To avoid any further confusion, we are amending Section 15.233(b) to reference the bandwidth requirement to the actual carrier frequency and not the "authorized" carrier frequency. We are also making some editorial changes to simplify this paragraph. These changes make the requirement consistent with those for other Part 15 devices and reflects the original intent. These amendments are not expected to have any impact on the design of cordless telephones.

Final Regulatory Analysis

14. Pursuant to 5 USC 601 et seq. an Initial Regulatory Flexibility Analysis was incorporated in paragraph 6 of the *Notice of Proposed Rule Making.* In paragraph 8 of this *NPRM,* written comments on this Analysis were solicited with the same filing deadlines as comments on the rest of the Notice. No comments in response to this request were received.

A. Need for and objective of rule.

15. This action is a follow-up to the Commission's *Report and Order* in this docket whereby interim rule provisions for cordless telephones were established. The requirement the Commission is adopting herein calls for a label to be carried on the package in which a cordless telephone

is marketed, to alert consumers that in certain environments cordless telephones may require features to preclude others from dialing calls via their telephone line. It is expected that the consumer can then purchase a unit with appropriate "security" features. The requirement is needed to address the concerns of telephone companies about misbilling of calls and other potential problems.

B. Summary of issues raised in comments on Initial Analysis.

16. No comments were received specifically concerned with the Initial Regulatory Flexibility Analysis in the Notice in this proceeding. While manufacturers question the need for the label, it appears to be the least burdensome approach to the potential problem of inadequate cordless telephone security. The requirement for the label and for describing the label in the application for equipment certification is considered to be of minimal burden and should not pose a hardship for small manufacturers.

C. Significant alternatives.

17. Two other significant alternatives are apparent. One is to move forward with a design requirement for cordless telephone security features as considered earlier in this proceeding. This alternative holds a number of disadvantages as discussed above and would be more costly for the public. The second alternative is to not adopt any requirement whatsoever pertaining to cordless telephone security. While marketplace forces are at work to alleviate the potential problem of inadequate cordless telephone security, evidence thus far suggests that the matter must be brought to the attention of the consumer in order for these forces to be focused on the problem.

Ordering Clauses

18. Pursuant to the above and under the authority of Sections 4(i), 302 and 303(r) of the Communications Act of 1934, as amended, IT IS ORDERED that Part 15 is amended as set out in the attached Appendix B. This amendment shall become effective June 10, 1985. The Office of Management and Budget has approved the collection of information requirement contained in this rule. The OMB control number is 3060-0324.

19. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

20. For further information concerning this Order contact Mr. Julius P. Knapp, Office of Science and Technology, telephone (202) 653-8247.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Appendix A - may be seen in FCC's Dockets Branch, 1919 M Street, N.W., Washington, D.C.

APPENDIX B

Part 15 of the FCC Rules, 47 CFR Part 15, is amended as follows:

1. Section 15.233 paragraph (b) is amended to read as follows:

Section 15.233 *Technical specifications*

* * * * *

(b) The emission shall be confined within a 20 kHz band centered on the actual carrier frequency. Modulation products shall be attenuated at least 26 dB below the level of the unmodulated carrier. Tests to determine compliance with this requirement shall be performed using an appropriate input signal as prescribed in Section 2.989 of this chapter.

* * * * *

2. Section 15.236 is amended by designating the present text as paragraph (a) and adding a new paragraph (b) to read as follows:

Section 15.236 *Labelling and identification requirements for a cordless telephone*

* * * * *

(b) For cordless telephones manufactured after November 1, 1985, the box or other package in which the individual cordless telephone is to be marketed must carry a statement in a prominent location, visible from the exterior, which reads as follows:

NOTICE: The base units of some cordless telephones may respond to other nearby units or radio noise, resulting in telephone calls being dialed through this unit without your knowledge and, possibly, calls being misbilled. In order to protect against such occurrences this cordless telephone is provided with the following features: (to be completed by the manufacturer).

Applications for certification of cordless telephones submitted on or after November 1, 1985, shall specify the complete text of the statement that will be carried on the package and indicate where, specifically, it will be located.

CATV Cable TV Relay Service (CARS)
CATV Cars Band
Control, Transfer of, Procedures
License, Application
Reports, Annual
Rules, Amendment of

Commission has implemented a single-step licensing process and eliminated or streamlined several filing and reporting requirements related to authorization applications, annual reports, and transfers of assignment or control for stations in the Cable Television Relay Service. These changes serve to expedite processing, thereby reducing costly regulatory delays and reporting burdens.
Amendment of Part 78
MM Docket No. 84-886

FCC 85-258

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Part 78 of the Commission's Rules Concerning Licensing Procedures and Reporting Requirements in the Cable Television Relay Service	MM Docket No. 84-886 RM-4328

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 13, 1985; Released: May 22, 1985

BY THE COMMISSION:

Introduction

1. In this *Report and Order*, we are amending several rules and policies pertaining to stations in the Cable Television Relay Service (CARS). Specifically, we are taking the following actions: 1) adopting a one-step licensing application process; 2) streamlining filing requirements for assignment or transfer of control applications; 3) eliminating the requirement that CARS applicants identify authorized program distribu-

tion facilities to be served; and 4) deleting the annual reporting requirements of certain CARS licensees.

Background

2. On January 7, 1983, Westinghouse Broadcasting and Cable, Inc. (Group W) filed a "Petition for Rulemaking" requesting several modifications to the current licensing procedures and reporting requirements for CARS facilities. In addition, Group W requested that the Commission address the allocation of additional spectrum to CARS, the need for certain technical and operational regulations, and the eligibility of master antenna television (MATV) systems for CARS licensees.

3. In response to Group W's petition, the Commission adopted a *Notice of Proposed Rule Making* (*Notice*) in the above-captioned proceeding.[1] In the *Notice*, we proposed to: 1) consolidate the two-step construction permit (CP) and licensing process into a one-step licensing process; 2) require licensees to file only one application for approval of assignment or transfer of control for all CARS authorizations affected; 3) require applications for approval of assignment or transfer of control to be filed only where a change occurs in the identity of the licensee or its ultimate controlling entity; 4) eliminate the requirement of FCC Form 327, Schedule E, to list all cable television communities served from each receive site of a proposed CARS station; and 5) delete the annual reporting requirement for CARS licensees who supply programming to others on a nonprofit, cost sharing basis. We also addressed Group W's concerns regarding the assignment of additional spectrum to CARS; the need for certain technical operational regulations; and the eligibility of MATV systems for CARS licenses. We indicated that Group W's first two concerns are more appropriate to consider as part of General Docket No. 82-334.[2] With respect to the eligibility of MATV systems for CARS licenses, we indicated that our prior opinion in *Cable Dallas I* would apply to such cases.[3]

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[1] *See Notice of Proposed Rule Making* in MM Docket No. 84-886, 49 FR 38160, adopted September 13, 1984.

[2] In General Docket No. 82-334, we currently are addressing the matter of a comprehensive spectrum utilization policy for terrestrial microwave services. *See First Report and Order* in General Docket No. 82-334, 48 FR 50722 (1983).

[3] The *Notice of Proposed Rule Making* in MM Docket No. 84-1296, 49 FR 48765 (1984) implementing certain provisions of the Cable Communications Policy Act, P. L. 98-549, §1 *et seq.*, 98 Stat. 2779 (1984), addresses the definition of the term "cable system" and proposes to permit certain MATV or SMATV systems to qualify as a cable system under this definition.

4. We received comments or replies from nine parties all of which are CARS microwave licensees or their representatives.[4] Westinghouse Broadcasting and Cable, Inc. (Group W), the original petitioner, filed a separate "Petition for Limited Reconsideration" which we are treating herein as a comment.[5]

Discussion

5. *Licensing Requirements.* In the *Notice,* we indicated that the current CARS licensing process appears unnecessarily burdensome and duplicative and proposed to replace it with a simplified one-step procedure. Under this proposal, the current construction permit and license steps would be combined and the CARS station licensee would be required to become operational within one year of the date of the license grant. We also requested comment concerning whether there is a need to require licensees to notify the Commission when construction of the station is complete.

6. All commenting parties support the proposal to combine the construction permit and license phases of the current CARS licensing process. Commenting parties agree with our initial finding that the current process is unnecessarily duplicative and burdensome. They differ, however, on the length of time that should be allowed for a CARS station to become operational. ATC, Gill Industries, TCI, and CBS/Black Hawk Cable concur with the one-year proposal. Group W and Heritage basically support the one-year time limit, however, Group W describes this as the "minimum acceptable" period and Heritage urges that provisions be made for extensions of time upon appropriate showings. The CARS users and the NCTA request an 18-month limit. They cite franchising process delays, equipment availability, and weather conditions as reasons for the need for additional time.

7. With respect to whether new licensees should be required to notify the FCC upon completion of construction, six parties believe that some type of notification is useful for frequency coordination purposes. ATC mentions the requirement contained in Section 78.36 of our rules for prior coordination of channels in the 12.7-13.25 GHz band. It suggests that new licensees be required to submit either a letter or postcard a short time following completion of construction. Heritage and CARS users, however, believe that notification is an unnecessary reporting obligation. Heritage

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[4] Parties filing comments and/or replies are: American Television and Communications Corporation ("ATC"); CBS/Black Hawk Cable Communications Corp.; Gill Industries; Heritage Communications, Inc.; National Cable Television Association ("NCTA"); 29 CARS microwave users (CARS users); Telecommunications, Inc. ("TCI"); Video Services Group of Centel Communications Company ("Centel"); and Group W.

[5] Under the Commission's rules, petitions for reconsideration may be filed only on final Commission actions. *See* 47 CFR §1.429.

notes that such reporting is not required for broadcast auxiliary stations and other licensees.

8. After consideration of the record before us, we find that the public interest would be better served by a one-step licensing procedure that eliminates the requirement for construction permits. This would facilitate more expeditious and efficient processing of CARS applications, and thereby enable stations to commence operation sooner and reduce the administrative burden of the licensing process on applicants and the Commission. Accordingly, we are adopting a new CARS licensing procedure that combines the separate CP and license applications into a single license application.[6] The new CARS licensing procedure will be similar to the one-step licensing plans we have already instituted for other services associated with mass media communications including remote pick-ups, studio-to-transmitter links, intercity relays, TV auxiliary stations, and ITFS facilities. In order to avoid disruption of CARS licensing activity currently in process, we will continue to process all pending CARS applications and outstanding construction permits according to the existing two-step procedure.

9. We continue to believe that one year is a sufficient period for licensees to complete construction and commence operation under normal circumstances. Thus, we are adopting a requirement that a CARS licensee complete construction and make the station fully operational within one year of the date the license is granted. However, in cases where additional time is needed, we may grant extensions for good cause and upon appropriate showing. In general, licensees will be required to submit requests for extensions of time at least 30 days prior to the expiration of the one year period. We also have decided to require CARS licensees to notify the Commission when the station commences operation. This notification may be in either letter or postcard form and *must* be submitted on or before the expiration date of the one year construction period. If notification that the station has commenced operation is not submitted within this period, the station license will be automatically forfeit. We believe this notification requirement is necessary to provide accurate records of actual CARS channel usage for frequency coordination purposes and that it does not impose a significant burden on licensees.

10. *Assignment and Transfer of Control.* In the *Notice*, we proposed to simplify certain aspects of the procedure for applying for assignment

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[6] Section 319(d) of the Communications Act has been amended to allow the Commission to eliminate the requirement for construction permits for certain types of stations, including privately-owned fixed microwave facilities such as CARS stations, if grant of a separate CP would not serve the public interest. *See* 47 U.S.C. §319(d), as amended by the Communications Amendments Act of 1982, P.L. 97-259.

or transfer of control of CARS stations. In cases involving transfer of control of two or more stations from one party to another single party, we proposed to permit applicants to prepare a single CARS license application form (FCC Form 327) that identifies all of the stations to be affected by the action and to submit a copy of the combined application for each individual station. We also proposed to require filing of applications for assignment or transfer of control only where there is a change in the ownership of the licensee or the ultimately controlling entity of the licensee. For example, under this procedure, we would not require notification if there were merely a change in the structure of intermediate corporate entities without a change in ownership of the licensee or the ultimate controlling entity of the licensee. We requested comment concerning any implications these proposals may have with respect to Section 310(d) of the Communications Act.

11. All commenting parties support the proposal that a single FCC Form 327 be filed for all CARS stations affected by an assignment or transfer of control. In addition, ATC, the CARS users, Group W, NCTA, and TCI suggest that the Commission adopt a procedure whereby a licensee notifies the Commission in writing of any change which does not affect an assignment or transfer of control. Heritage states that a name change in a corporate licensee should be subject only to a notification requirement; but, it believes that Commission approval is required under Section 310(d) of the Communications Act for "all transfers, including *pro forma* transfers of controls and assignments."

12. After consideration of the record on this issue, we have decided to revise the requirements with respect to assignment or transfer of control of CARS licenses in the manner proposed in the *Notice*. We believe that the current procedure that requires a licensee transferring two or more CARS stations to a single party to submit individual FCC Form 327 transfer applications for each station is unnecessarily burdensome and may cause needless administrative delays. Similarly, we see no need for FCC approval in cases where ownership transfer does not result in a change in the identity of the licensee or the ultimate controlling interest of the licensee. Section 310(d) requires Commission approval only when a license is transferred to another person or when control of a corporation holding a license is transferred.[7] Thus, Section 310(d) does not appear to require FCC approval of ownership changes that do not involve a change

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[7] Section 310(d) of the Communications Act provides, in relevant part, that "[n]o ... station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, or to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." 47 U.S.C. §310(d).

in the identity or controlling interest of the licensee. *Pro forma*, or "short form," assignments or transfers of control which do involve such changes will continue to require approval.

13. Under the new procedures, CARS licensees transferring multiple stations to a single party will prepare a single FCC Form 327 application that lists each station to be transferred. The licensee will then submit one copy of this combined application for each CARS station listed thereon. For example, if five stations are being transferred, the licensee would submit five copies of the same combined FCC Form 327.

14. Also, we no longer will require the filing of requests for approval of CARS station ownership changes that do not affect the identity or controlling interest of the licensee.[8] Thus, CARS licensees will not be required to notify the Commission at all of such transfers of ownership. In all cases of ownership transfer, the party holding the controlling interest in the licensee shall be determined in accordance with current Commission policy. *See, e.g., News International, PLC*, 97 FCC 2d 349, 355 (1984).

15. *Identification of communities served.* Section 78.1 of the Commission's rules provides that CARS stations are to be authorized for the purposes of relaying signals to cable television systems, TV translator stations, and low-power TV stations.[9] In order to ensure that CARS facilities are used in accordance with their authorized purposes, applicants for CARS stations are required to list all such authorized distribution facilities to be served from each receive site on the license application. This information is submitted on Schedule E of FCC Form 327. In addition, licensees are required under Section 78.1(e)(6) of the rules to provide the Commission 30 days advance notice when program material relayed over a CARS facility is to be supplied to any cable system that has not been specified in the license application or on a prior notification to the Commission.[10]

16. In the *Notice*, we proposed to eliminate the requirement to list all authorized distribution facilities served by each receive site of the proposed station on the license application. We stated that the identification of one authorized distribution facility appears to be sufficient to verify compliance with the rules. Consistent with this interpretation, we also proposed to delete the rule requiring 30 day advance notification when program material is to be provided to distribution facilities not previously reported to the Commission.

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[8] We wish to emphasize that in cases involving changes in the identity or controlling interest of the licensee, we will continue to require the licensee to apply for FCC approval on FCC Form 327.

[9] *See* 47 CFR §78.1.

[10] *See* 47 CFR §78.11(e)(6).

17. The commenting parties unanimously support these proposals and concur with our initial opinion that identification of a single authorized program distribution facility is sufficient to demonstrate that the CARS station is being used for its intended purposes. Commenters offer alternative suggestions with respect to the single program distribution facility that would be identified under the revised requirement. NCTA, Group W, and Heritage suggest that any cable system served from the receive site would be satisfactory to verify compliance with Section 78.1. ATC, Gill Industries, the CARS users, and Centel submit that the cable community unit specified be either the community with the largest number of subscribers (the "dominant" community) or the lead or headend community (the "primary" community) where CARS stations serve a large cable system. Centel also suggests that applicants should be permitted to list additional cable communities in cases where notice of CARS station operation might be helpful in other activities such as frequency coordination.

18. After full consideration of the record on this issue, we have determined that certification by the applicant that at least one cable system, TV translator, or low power TV station will be served by the CARS station is sufficient to demonstrate that the station will be used for authorized purposes under Section 78.1. We find no regulatory need for the identity of any specific authorized program distribution facility served from a CARS receive site. Accordingly, we are replacing Schedule E of FCC Form 327 with a statement that the CARS applicant certifies the station will provide service to at least one authorized program distribution facility.

19. *Annual reporting requirement.* We proposed to eliminate the Section 78.11(f) requirement that CARS licensees who supply program material to cable television systems or television translator stations either without charge or on a nonprofit, cost sharing basis, file annual reports containing financial statements and user service information.[11] In the *Notice*, we indicated that we believe that the record keeping requirement of Section 78.11(d)(2) adequately serves the purpose of documenting the no-charge or nonprofit, cost-sharing nature of such CARS service. These records must be maintained by the licensee and must be available for inspection by the Commission. The commenting parties unanimously support our initial proposal. We find that regular collection of the information provided in the annual reports is not necessary for any regulatory purpose. Accordingly, we are eliminating Section 78.11(f) as proposed.

20. *Frequency allocation and other technical matters.* In the *Notice*, we stated our belief that it would be more appropriate to address

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[11] *See* 47 CFR §78.11(f).

Group W's concerns relating to additional frequencies for CARS use, the sharing of excess capacity, and other technical and operational matters as part of a comprehensive spectrum utilization policy for terrestrial microwave services. Such policies are currently under consideration in General Docket No. 82-334.[12] Group W, with supporting comments filed by NCTA, reiterates several requests which it alleges that the Commission has not addressed adequately in the *Notice*. Specifically, Group W requests that the Commission: 1) permit temporary operation of less than 30 days without prior authorization; 2) permit CARS licensees to share excess capacity; 3) permit non-adjacent K channels to be authorized; 4) permit changes in the height of the radiating element of a transmitting antenna and the height of a receiving antenna without Commission approval; 5) permit minor horizontal site location changes without prior approval; 6) permit a decrease or increase in authorized operating power of less than three dB without prior approval; and 7) authorize new channel alignment to accommodate 6 MHz spacing for the use of harmonically related carriers by Local Distribution Service (LDS) stations.

21. We continue to believe that it is more appropriate to address the above technical concerns in the context of the comprehensive review of the spectrum utilization policies for terrestrial microwave services in General Docket No. 82-334. We intend to consider the technical and operational aspects of CARS microwave services in a further notice of proposed rule making in General Docket No. 82-334. Accordingly, we are not addressing such issues in this proceeding.

22. *Processing of Applications*. Group W asserts that the Commission appears to delay processing an application for CARS facilities when another application is subsequently filed for different facilities at the same station. It claims that action is delayed on the first application until the subsequently filed application is also ready to be acted upon. Group W urges that this practice be eliminated because it causes unnecessary delays in the commencement of new and improved services to the public.

23. The Commission continuously reviews and revises its internal procedures with respect to the processing of license applications. While we believe that our current procedures for handling CARS applications are appropriate, we will consider Group W's concern and will examine these procedures to determine whether they include practices that could lead to unnecessary delays. If such practices are found, we will implement appropriate changes to expedite final action on CARS applications.

Conclusion

24. The decisions we are making today will serve to reduce delays in licensing CARS facilities and to eliminate unnecessary reporting require-

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[12] *See* Footnote 1, *supra*.

ments for CARS licensees. Accordingly, we are amending our rules to: 1) implement a one-step licensing process for CARS applicants; 2) permit the filing of a single FCC Form 327 listing all CARS authorizations affected by an assignment or transfer of control; 3) eliminate the requirement to file for an assignment or transfer of control in cases where no actual change in ownership has occurred in either the licensee itself or the ultimate controlling parent; 4) eliminate the need to identify all community units to be served from each receive site of a proposed CARS station and replace it with a requirement that the applicant certify that the CARS station will serve at least one authorized program distribution facility; and 5) delete the requirement for CARS operators who provide program material to cable television systems or translator stations on a nonprofit, cost sharing basis to file annual reports and to notify the Commission 30 days prior to providing such programming.

25. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need for and purpose of the rules.

The rule changes we are adopting will reduce delays and other costs for both licensees and the Commission.

II. Summary of issues raised by public comments in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result.

A. Issues Raised.

The commenting parties raised no issues or concerns in response to the initial regulatory flexibility analysis.

B. Assessment.

The Commission views the absence of specific claims of adverse impact with respect to its CARS proposals as indicative of their lack of potential for negative effects on small businesses.

C. Changes made as a result of such comments. None.

III. Significant alternatives considered and rejected.

The Commission's alternative was not to revise its filing and reporting requirements. Lack of action, however, would result in continued delays and none of the benefits which could accrue to all CARS licensees as a result of the changes.

Paperwork Reduction Act

26. The recommended changes contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose modified requirements and reduce the burden on the public. Implementa-

tion of these changes will be subject to approval by the Office of Management and Budget as prescribed by the Act.

Ordering Clauses

27. Authority for adoption of the rules contained herein is contained in Sections 2, 4(i) 303 and 319 of the Communications Act of 1934, as amended.

28. Accordingly, IT IS ORDERED that, Part 78 of the Commission's Rules and Regulations IS AMENDED effective June 28, 1985, as set forth in the attached Appendix. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Appendix

Part 78 of Title 47 of the Code of Federal Regulations is amended as follows:

1. 47 CFR 78.11 is amended by removing paragraphs (e) and (f) in their entirety, removing paragraph (h), and redesignating paragraph (i) as paragraph (e).

2. 47 CFR 78.15 is amended by revising paragraphs (b) and (c) to read as follows:

§ 78.15 Contents of applications.

* * * * *

(b) An application for a CARS studio to headend link or LDS station license shall contain a statement that the applicant has investigated the possibility of using cable rather than microwave and the reasons why it was decided to use microwave rather than cable.

Note: * * *

(c) CARS applicants must follow the procedures prescribed in Subpart I of Part I of this chapter (§§1.1301 through 1.1319) regarding the filing of environmental impact narrative statements, unless Commission action authorizing construction of a CARS station would be a minor action within the meaning of Subpart I of Part I of this chapter.

3. 47 CFR 78.20 is amended by revising paragraph (a) to read as follows:

§ 78.20 Acceptance of applications; public notice.

(a) Applications which are tendered for filing in Washington, D.C., are dated upon receipt and then forwarded to the Mass Media Bureau, where an administrative examination is made to ascertain whether the applications are complete. Applications found to be complete or substantially complete are accepted for filing and are given a file number. In case of minor defects as to completeness, the applicant will be required to supply the missing information. Applications which are not substantially complete will be returned to the applicant.

* * * * *

4. 47 CFR 78.22 is amended by revising paragraph (c) to read as follows:

§78.22 Objections to applications.

* * * * *

(c) Notwithstanding the provisions of paragraph (a) of this section, before Commission action on any application for an instrument of authorization, any person may file informal objections to the grant. Such objections may be submitted in letter form (without extra copies) and shall be signed by the objector. The limitation on pleadings and time for filing pleadings provided for in §1.45 of this chapter shall not be applicable to any objections duly filed pursuant to this paragraph.

5. 47 CFR 78.23 is amended by revising paragraphs (a), (b), and (d), and by removing paragraph (c) in its entirety and redesignating paragraph (d) as paragraph (c).

§ 78.23 Equipment tests.

(a) Following the grant of a CARS license, the licensee, during the process of construction of the station, may, without further authority from the Commission, conduct equipment tests for the purpose of such adjustments and measurements as may be necessary to assure compliance with the terms of the authorization, the technical provisions of the application therefore, the rules and regulations, and the applicable engineering standards.

(b) The Commission may notify the licensee to conduct no tests or may cancel, suspend, or change the date for the beginning of equipment tests as and when such action may appear to be in the public interest, convenience, and necessity.

(c) The tests authorized in this section shall be conducted only as a necessary part of construction.

6. 47 CFR 78.25 is removed in its entirety.

7. 47 CFR 78.27 is revised by marking the existing paragraph as (a) and adding new paragraphs (b) and to read as follows:

§78.27 License conditions.

(a) Authorizations (including initial grants, modifications, assignments or transfers of control, and renewals) in the Cable Television Relay Service to serve cable television systems, shall contain the condition that such cable television system shall operate in compliance with the provisions of Part 76 (Cable Television Service) of this chapter.

(b) CARS stations licensed under subpart are required to commence operation within one year of the date of the license grant.

(1) The licensee of a CARS station shall notify the Commission in writing when the station commences operation. Such notification shall be submitted on or before the last day of the authorized one year construction period; otherwise, the station license shall be automatically forfeited.

(2) CARS licensees needing additional time to complete construction of the station and commence operation shall request an extension of time 30 days before the expiration of the one year construction period. Exceptions to the 30-day advance filing requirement may be granted where unanticipated delays occur.

8. 47 CFR 78.35 is amended by revising paragraph (a) and adding new paragraph (c) to read as follows:

§ 78.35 Assignment or transfer of control.

(a) No assignment of the license of a cable television relay station or transfer of control of a CARS licensee shall occur without prior FCC authorization.

* * * * *

(c) Licensees of CARS stations are not required to submit applications for assignment or transfer of control or otherwise notify the FCC in cases where the change in ownership does not affect the identity or controlling interest of the licensee.

9. 47 CFR 78.51 is amended by revising paragraph (c) to read as follows:

§ 78.51 Remote control operation.

* * * * *

(c) The Commission may notify the licensee not to commence remote control operation, or to cancel, suspend, or change the date of the beginning of such operation as and when such action may appear tp be in the public interest, convenience, or necessity.

10. 47 CFR 78.53 is amended by revising paragraph (c) to read as follows:

§ 78.53 Unattended operation.

* * * * *

(c) The Commission may notify the licensee not to commence unattended operation, or to cancel, suspend, or change the date of the beginning of such operation as and when such action may appear to be in the public interest, convenience, or necessity.

11. 47 CFR 78.63 is amended by revising the introductory paragraph to read as follows:

§ 78.63 Inspection and maintenance of tower marking and associated control equipment.

The licensee of any CARS station which has an antenna structure required to be painted or illuminated pursuant to the provisions of Section 303(q) of the Communications Act of 1934, as amended, and/or Part 17 of this Chapter, shall operate and maintain the tower marking and associated control equipment in accordance with the following:

* * * * *

12. 47 CFR 78.69 is amended by revising the introductory paragraph to read as follows:

§ 78.69 Station records.

Each licensee of a CARS station shall maintain records showing the following:

* * * * *

13. 47 CFR 78.113 is amended by revising paragraph (a) to read as follows:

§ 78.113 Frequency monitors and measurements.

(a) The licensee of each CARS station shall employ a suitable procedure to determine that the carrier frequency of each transmitter is maintained within the tolerance prescribed in §78.111 at all times. This determination shall be made, and the results thereof entered in the station records: when a transmitter is initially installed; when any change is made in a transmitter which may affect the carrier frequency or the stability thereof; or in any case at intervals not exceeding one year.

* * * * *

Cellular Communications Systems
Comparative Criteria
Comparative Hearing
Mobile Radio Service, Cellular Applications

Initial Decision affirmed granting cellular nonwireline application where one applicant's proposed system covering more area and population and its slight preference for its expansion plan overcomes opponents' slight preferences for demand assessments, service proposals and rate levels.

American Mobile Communications
—CC Docket No. 83-445

FCC 84-371

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	CC Docket No. 83-445
American Mobile Communications of Washington and Oregon	File No. 26110-CL-P-82
Cellular Mobile Systems of Washington, Inc.	File No. 26183-CL-P-82
Interstate Mobilephone Company	File No. 26150-CL-P-82
MCI Cellular Telephone Company	File No. 26104-CL-P-82
For a Construction Permit to establish a new cellular system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Portland, Oregon, Metropolitan Statistical Area	

Appearances

Henry Goldberg and *Phillip Spector* on behalf of American Mobile Communications of Washington and Oregon; *Edward P. Taptich, Lawrence C. Movshin, William K. Keane, George L. Lyon, Jr., and Robert B. Kelly* on behalf of Cellular Mobile Systems of Washington, Inc.; *Carl W. Northrop, Diane B. Cohn, and L. Andrew Tollin* on behalf of Interstate Mobilephone Co.; *William J. Potts, Jr., John M. Pelkey, and Melodie A. Virtue* on behalf of MCI Cellular Telephone Co.; *James O. Juntilla and Jerry M. Hermele* on behalf of the Separated Trial Staff, Common Carrier Bureau, Federal Communications Commission.

FINAL DECISION

Adopted July 26, 1984; Released August 24, 1984

BY THE COMMISSION: COMMISSIONER DAWSON DISSENTING AND ISSUING A STATEMENT.

1. The captioned applicants have filed exceptions to the Initial Decision of Administrative Law Judge John M. Frysiak, who awarded Interstate Mobilephone Company (Interstate) authority to construct a cellular radio telecommunications system on frequency Block A in the Portland, Oregon Metropolitan Statistical Area (MSA). *American Mobile Communications of Washington and Oregon*, FCC 84D-5, Mimeo 2006, released January 26, 1984. Judge Frysiak found Interstate to be comparatively superior under two of three issues designated for hearing, and concluded that grant of Interstate's application would best serve the public interest, convenience and necessity. American Mobile Communications of Washington and Oregon (AMCOM), Cellular Mobile Systems of Washington, Inc. (CMS) and MCI Cellular Telephone Company (MCI) have excepted to virtually every aspect of the judge's Initial Decision (*I.D.*). Interstate has also excepted, seeking greater comparative advantage than that accorded by the presiding judge. For the reasons stated below, we affirm the *I.D.*, as modified by this Decision, thereby affirming the grant of Interstate's application. Except as otherwise noted, the Findings of Fact and Conclusions of Law of the *I.D.* are incorporated by reference herein.

I. Background

2. On May 9, 1983, the Common Carrier Bureau designated the mutually exclusive applications of AMCOM, CMS, Interstate and MCI for comparative hearing on the following issues:

(a) To determine on a comparative basis the geographic area and population that each applicant proposes to serve; to determine and compare the relative demand for the services proposed in said areas; and to determine and compare the ability of each applicant's cellular system to accommodate the anticipated demand for both local and roamer service;

(b) To determine on a comparative basis each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed CGSA in order to meet anticipated increasing demand for local and roamer service;

(c) To determine on a comparative basis the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching capabilities); and

(d) To determine, in light of the evidence adduced under the foregoing issues, what disposition of the referenced applications would best serve the public interest, convenience and necessity.[1]

The Common Carrier Bureau's Separated Trial Staff was also made a party to the proceeding.

3. Pursuant to the special procedures governing cellular radio applications in the top 30 markets,[2] the applicants filed their direct cases with their applications on June 7, 1982. The applicants filed written rebuttal cases on June 30, 1983 and evidentiary sessions were held on September 29, 30, October 4 and 6, 1983 before Judge Frysiak at the Commission's offices. On October 6, 1983, Judge Frysiak closed the record. No oral evidence was taken and no surrebutal was permitted. Proposed Findings of Fact and Conclusions of Law were filed by the parties November 8, 1983 and Reply Findings were filed November 22, 1983.

4. In his *I.D.*, the judge awarded Interstate a preference under Issue (a) for its proposed geographic area and population coverage and a preference for its superior ability to accommodate roamers. As a result of the individual preferences awarded for these subissues, the judge awarded Interstate a substantial preference under issue (a) as a whole. *I.D.*, para. 86. Both AMCOM and Interstate were awarded a preference under Issue (b) for their system expansion proposals. *I.D.*, para. 95. Under Issue (c), the judge awarded CMS a preference for its proposed rate structure. The judge found that the preferences awarded to AMCOM and CMS did not outweigh the substantial preference awarded to Interstate on Issue (a) and the preference Interstate earned under Issue (b). Accordingly, the judge found Interstate's proposal to be superior to the other applicants'.[3]

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[1] GTE Mobilnet of Portland Incorporated (Portland Designation Order), 53 RR 2d 1490 (Com. Car. Bur. 1983) (footnotes omitted).

[2] Cellular Communications Systems (Reconsideration), 89 FCC 2d 58, 87-91 (1982), *further reconsideration* 90 FCC 2d 571 (1982), *appeal dismissed sub nom.* United States v. FCC, Civ. No. 82-1526 (D.C. Cir. March 3, 1983). *See also* 47 C.F.R. § 22.916(b)(1).

[3] We will use the terms "slight," "moderate" and "substantial" to describe the preferences awarded to the applicants. A "moderate preference" is identical to a "preference," and is entitled to the same comparative credit.

5. The parties filed their exceptions to the *I.D.* on February 27, 1984 and filed replies on March 16, 1984, pursuant to an extension of time granted by the Common Carrier Bureau. The Separated Trial Staff (STS) also filed a reply on March 16, 1984.[4]

II. Issue (a)

6. This issue calls for a comparison of three aspects of the parties' applications: the geographic areas and population that the applicants propose to serve, the relative demand for service within these areas, and the ability to accommodate demand of local subscribers, as well as roamers. *See Rogers Radiocall, Inc. (Chicago Final Decision)*, FCC 84-62, released March 6, 1984, at para. 8, *recon. pending*; *MCI Cellular Telephone Company (Pittsburgh Final Decision)*, FCC 84-61, released March 6, 1984, at para. 9, *recon. pending.*[5]

Geographic Area and Population

7. The judge found that the Portland MSA encompasses 3,653 square miles in Clackamas, Multnomah and Washington counties, Oregon and Clark County, Washington. The MSA's 1980 census population is 1,242,594. The following table provides the judge's findings with respect to the overall area and population served by each applicant.

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[4] AMCOM has also submitted an application for review of an order, taken pursuant to delegated authority, denying a request for consolidated oral argument in the Portland and Seattle proceedings. American Mobile Communications of Washington and Oregon, Mimeo 3738, released April 23, 1984. Interstate has opposed the application for review. AMCOM argues that it has raised a number of significant legal issues which would best be resolved by resort to oral argument. AMCOM further argues denial of its request amounts to a denial of due process. We are not persuaded to grant AMCOM's request. AMCOM has been accorded its full hearing rights pursuant to our order in Cellular Communications Systems (Reconsideration) 89 FCC 2d 58, 93-94 (1982). AMCOM has completely and thoroughly discussed its objections to the *I.D.* in its exceptions and reply. In view of the Commission's continual efforts to expedite the cellular licensing process, AMCOM has failed to demonstrate how oral argument would enhance the Commission's ability to resolve the issues raised in the Portland proceeding. Accordingly, we find that grant of AMCOM's request would not contribute to a proper resolution of the issues.

[5] In Cellular Communications Systems, 86 FCC 2d 469, 502 (1981), we stated that the Commission would treat geographic area as a major basis of comparison. Consideration is given to the presence of densely populated regions, highways, and other areas likely to have mobile usage characteristics within the service areas, as well as indications of substantial public need, including the results of public need surveys.

	Geographic Area		Population	
	Total Served	Percentage of MSA	Total Served	Percentage of MSA
AMCOM	1,233 sq. mi.	33.75%	1,174,559	94.52%
CMS	1,043 sq. mi.	28.55%	1,140,008	91.74%
Interstate	1,574 sq. mi.	43.08%	1,186,608	95.49%
MCI	1,190 sq. mi.	32.57%	1,161,051	93.43%

The figures are based on the applicants' calculations of area and population falling within their 39 dBu contours, using a 100 foot minimum elevation to calculate propagation. *See* 47 C.F.R. §22.504(b) and *I.D.*, para. 8. The judge found that all four proposals serve the major population centers, employment centers and traffic corridors in the Portland area. *I.D.*, para. 9.

8. In comparing areas of unique coverage, known as "pockets," the judge found Interstate's proposal to be superior. The judge compared Interstate's proposal to AMCOM's, which had the second-largest coverage of the Portland area, and found that Interstate encompassed 490 more square miles, 40,946 more persons, 835 more businesses, 3,286 more employees and 2,015 more high-income households than did AMCOM.[6] In comparison, AMCOM's pockets not served by Interstate encompass one square mile, 130 persons, 2 businesses, 12 employees, 6 high-income households and no major highways. *I.D.*, para. 11. The judge also found that Interstate serves sections of various highways with average daily traffic (ADT) volumes in excess of 10,000 vehicles, that AMCOM does not serve. *I.D.*, para. 9.

9. The judge based his pocket analysis on figures provided by Interstate in its rebuttal case. *I.D.*, n. 10. In making its calculations, Interstate made several "corrections" to MCI's contours based on alleged errors in MCI's site coordinates, ground elevations and average elevations for MCI cell sites two and four. Because MCI failed to present a detailed pocket analysis, the judge found that Interstate's rebuttal exhibit constituted the best record evidence of pocket coverage.[7] He declined, however, to rely solely on Interstate's figures for his overall area and population analysis, preferring to rely on each individual applicant's calculations. Based on the foregoing, the judge awarded a preference to Interstate for its superior area and population coverage.

10. AMCOM, Interstate and CMS raise numerous exceptions to the *I.D.'s* findings on this issue, and specifically to the judge's reliance on Interstate's pocket analysis. AMCOM asserts that the one percent

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[6] Comparable or greater differences were found to exist in comparing Interstate's system with CMS' and MCI's proposals. *See I.D.*, paras. 9-10, 73-74.

[7] The judge noted that even giving full credence to MCI's calculation of its contours, Interstate covers 400 square miles and 25,000 persons more than MCI. *I.D.*, n. 10.

difference between Interstate's and AMCOM's overall population coverage is decisionally insignificant, and that Interstate's pocket analysis, showing a three percent difference in population coverage, is suspect because Interstate used a different propagation methodology in recalculating the applicants' contours.[8] AMCOM also argues that the judge committed plain error in failing to reconcile the two population figures. MCI objects to use of Interstate's pocket analysis because the "corrections" made to its contours are unsubstantiated. *I.D.*, n. 10. MCI further objects to the judge's reliance on Interstate's pocket analysis because its findings are inconsistent with the individual applicants' overall coverage calculations. Interstate, on the other hand, argues that the figures relied upon by the judge understate its superiority. Interstate seeks credit for the even greater differences in overall population coverage found in AMCOM's rebuttal case and MCI's rebuttal case.

11. We can find no basis on which to overturn the judge's decision to award a preference to Interstate for its superior area and population coverage. The various analyses which the applicants seek to discredit consistently demonstrate that Interstate proposes the largest area and population coverage.[9] Moreover, the judge's choice of figures represented an attempt to compare contours on the basis of a common propagation methodology — *i.e.*, the 39 dBu contours plotted according to Section 22.504 of the rules, defaulting to a minimum effective antenna height of 100 feet. The same considerations caused the judge to rely on Interstate's pocket analysis, despite his finding that Interstate's recalculations of MCI's contours were not sufficiently documented. As the judge noted, even if full credit were given to MCI's own calculations of its contours, Interstate covers substantially more area and population. *See* note 6, *supra*.[10] Furthermore, the decision to award Interstate a moderate preference for its coverage is not based on the size or demographics of its pockets alone. By any measure, Interstate's 39 dBu contours cover over

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[8] AMCOM argues that Interstate used a different calculation methodology for each applicant in preparing its pocket analysis. We can find no basis for support of this allegation in the record. AMCOM cites to the *I.D.* at n. 31, which merely states that the differences between overall coverage figures and Interstate's re-calculation for its pocket analysis may be explained by resort to the different techniques employed in determining coverage. This footnote does not state, however, that Interstate's analysis is internally inconsistent.

[9] The applicants have analyzed their own proposals, along with their opponents', using the 100' default assumption that is the standard Commission practice, a 25' antenna default height assumption and an alternative methodology developed by Motorola. Various analyses also introduced other variables, such as use of more precise contour maps. *See I.D.*, at n. 6.

[10] We also decline to rely on MCI's calculations. The judge's selection of figures is reasonable, in light of the apparent errors in MCI's calculations, and there is no basis to overturn it.

nine percent more area, at least one percent more of the population, and greater highway coverage than do the other applicants'. *See* Separated Trial Staff Reply to Exceptions, at para. 20.

12. AMCOM also argues that Interstate should not be granted a preference because Interstate's area and population coverage is a direct result of Interstate's *de minimis* extension of its service area beyond the MSA. AMCOM further argues that Interstate does not deserve credit for its coverage because its 39 dBu contours extend beyond the high potential user boundaries drawn by Interstate's engineering consultant.

13. We reject both arguments. The Commission has previously decided that comparative credit will be given for coverage *within* the MSA resulting from *de minimis* extensions beyond the MSA borders.[11] *Pittsburgh Final Decision*, *supra*, at para. 14. Furthermore, even if portions of Interstate's service area are outside the high potential user boundaries, Interstate has demonstrated that need exists outside of these boundaries. *See* Interstate App. Vol. II, App. P. Accordingly, Interstate receives full credit for all its intra-MSA coverage.

14. Interstate seeks a substantial, rather than a moderate, preference for area and population coverage because its service area is much larger than AMCOM's system, the next-largest. Interstate argues that a substantial preference is warranted because the Commission gave the winning applicants in the *Chicago* and *Pittsburgh* decisions[12] a slight preference for being 127 square miles and 216 square miles larger, respectively, than the next-largest proposed system. Interstate alleges, based on its pocket analysis, that its system is 490 square miles larger than AMCOM's.

15. We decline to expand Interstate's preference to a "substantial" preference, absent some indication that the judge's decision is unreasonable. Decisions to award coverage preferences are not made on the basis of area coverage alone, but include considerations of the magnitude of differences in population coverage areas with a high indicia of cellular demand.

16. CMS seeks comparative credit for its depth and breadth of coverage. CMS argues that it covers the same metropolitan population, employment and transportation centers as does Interstate, and that the population density of its system is greater than Interstate's. CMS further argues that its overlapping cell design will provide more reliable service.

17. We reject CMS' arguments. The fact that CMS covers the same areas of anticipated heavy cellular use as Interstate does not render comparisons between the two systems meaningless. Furthermore, population density of the system's coverage area in the absence of a high indicia

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[11] Of course, coverage of areas *outside* the MSA has not been considered.

[12] Chicago Final Decision, at para. 14; Pittsburgh Final Decision at para. 14.

of cellular demand, is not a basis for comparison. We also decline to give CMS credit for its depth of coverage design.[13] In the *Chicago Final Decision*, at para. 14, we declined to give CMS credit on this issue because CMS failed to demonstrate that service to portables would be impaired in the absence of overlapping cells. Similarly, CMS has failed to meet this burden here.[14]

18. MCI alleges that the judge erred in his evaluation of issue (a) by placing a disproportionate weight on geographic and population coverage. CMS argues that "raw" coverage has been permitted to overshadow the other aspects of issue (a) in awarding a preference to Interstate. CMS and MCI argue that awarding a preference to Interstate solely on the basis of its geographic area and population coverage violates the Commission's announced policy of de-emphasizing raw coverage area. *Cellular Communications Systems (Filing Procedures)*, 51 RR 2d 143 (C.C.B.1982) (Public Notice stating that a cellular applicant does not necessarily lose advantage by serving less than all of the SMSA).

19. We disagree with the arguments set forth by MCI and CMS. The central consideration embodied by issue (a) is whether a cellular system has been designed to meet demand. In the *Filing Procedures* Public Notice, the Common Carrier Bureau gave applicants guidance to the effect that coverage of sparsely populated or unpopulated areas would not result in comparative advantage because coverage of these areas would be uneconomical and wasteful. In Portland, all four applicants have wisely chosen to limit their CGSA to that portion of the MSA which is likely to generate the most demand. In such a situation, comparative advantage accrues to the applicant who covers more area which is likely to generate demand. Our review of the *I.D.* satisfies us that comparative advantage did not accrue to Interstate based merely on its sheer size.[15]

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[13] CMS' design concept is discussed *infra*, paras. 67-73, as part of our analysis regarding its expansion plan. While we decline to give CMS a preference for its design, we reverse the judge's findings that CMS' system design violates fundamental principles of cellular design. *See* Chicago Final Decision, at para. 14.

[14] Even assuming *arguendo*, that CMS did prove that an overlapping design is more reliable, the other Portland applications also reflect a high degree of overlap. Interstate, for example, has overlapping cells in all but 54.3% of its system, compared to CMS' 45.8%. CMS Reb. Ex. 1 at 12-13.

[15] Thus, we reject CMS' argument that Interstate should not be given credit for areas of unique coverage, absent some showing of demand in these areas. Various types of showings are sufficient to warrant a preference for areas of unique coverage. In *Pittsburgh*, the Commission found that a showing based on demographics alone, as opposed to a demand study, was sufficient to warrant a slight preference for pocket coverage. *Pittsburgh Final Decision* at para. 13; *see also Chicago Final Decision* at para. 14 (awarding Rogers comparative credit for its pocket coverage where it had demonstrated demand by actual demand studies). Interstate similarly relied on demo-

20. We therefore affirm the presiding judge's finding that Interstate merits a moderate preference for its superior geographic area and population coverage. Based on the overall coverage analysis, Interstate covers more areas with high indicia of cellular demand.

Relative Demand for Service.

21. All of the applicants for the Portland nonwireline license conducted demand studies in an effort to determine the level of demand, how demand is distributed around the MSA, and how demand will change over time. The *I.D.* awarded no comparative credit on this issue to any of the applicants. The judge conducted an extensive analysis of the applicants' studies, and found all approaches to be flawed. Only the pertinent findings regarding the demand studies will be restated here. An abbreviated version of the judge's findings regarding initial and future demand is shown in the following table.[16]

	Estimated Subscribers			
Year of Operation	*AMCOM*	*CMS*	*INTERSTATE*	*MCI*
1	2,444	1,121	523	900
5	8,344	7,452	2,130	5,800
10	11,510	–	8,166	–

22. *AMCOM's demand assessment.* AMCOM primarily relied upon a study conducted by Arthur D. Little, Inc. (ADL), surveying businesses ADL designated as high potential users of cellular telecommunications. *See* AMCOM Application, Vol. III. ADL first determined which employment categories were likely to be cellular users by reference to current users of existing private or common carrier mobile services, and projected the total number of those employed in occupations or industries likely to be cellular users in Portland through 1993. To determine the demand for cellular among this population, ADL surveyed businesses which employ these potential users. Of the 310 eligible businesses contacted, a total of 218 interviews were completed, and 30 of those interviewed indicated an interest in subscribing to cellular service. This represents a 9.7 percent demand rate at a 90 percent confidence level ± 2.8 percent. ADL then applied the 9.7 percent demand rate to the universe of potential users. ADL discounted the initial total demand by 75 percent initially, assuming that it would take five years for demand for cellular technology to reach its full potential. ADL did not survey other employment sectors, *i.e.* those

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graphics to demonstrate that its areas of unique coverage have a high indicia of cellular use.

[16] Interstate assumes it will initially capture one-third of the cellular market gradually rising to a one-half share. The other applicants assume that they will initially capture one-half of the market.

sectors not as likely to be potential users. ADL assumed that the penetration rate for these employment categories would initially be .5 percent, gradually rising to 1.5 percent in year ten. Based on the above analysis, ADL found that initial demand in Portland would require service to 5370 subscribers, of which AMCOM could expect to serve one-half. ADL then distributed demand geographically through an analysis of the demographics by census tract, weighting the demand estimates for each tract by a factor of ± 25 percent based on the presence or absence of indicators of high or low cellular use.[17]

23. In his *I.D.,* the judge found AMCOM's demand forecast to be suspect because fully one-half of the initial demand results from ADL's assumption that cellular penetration among other employment sectors will be .5 percent. Further, the judge criticized ADL's failure to explain why its survey of high potential users was limited to executives and managers. *I.D.,* para. 78.

24. AMCOM takes exception to the judge's finding regarding its assumed penetration rate of other employment sectors. AMCOM argues that .5 percent is not an unreasonable assumption, and that the selection of that rate was based on the expert judgment of its research consultant, a firm experienced in researching telecommunications technologies. CMS, in reply, argues that the penetration rate among other employment sectors is not susceptible of expert judgment.

25. We affirm the judge's finding that AMCOM's study is flawed due to its assumption of a penetration rate. Bald assumptions of a probable penetration rate are unacceptable. *See Chicago Final Decision,* para. 21. While we have recognized that certain assumptions must necessarily be made in order to design a demand survey[18] or to predict future demand, an initial or future penetration rate should be grounded in empirical research, not simply assumed.[19] In AMCOM's case, its assumption regarding penetration in other employment sectors resulted in a doubling of its demand estimate. Accordingly, we agree with the judge that AMCOM's assumption constitutes a major flaw in its assessment of

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[17] AMCOM conducted two other studies in an effort to determine demand. One study, conducted by National Family Opinion, Inc., surveyed consumers in six markets, including Portland, to determine probable cellular usage. The study found that 4.9% (± 2% at 95% confidence level) of consumers surveyed would subscribe at monthly rates between $30 and $120. The other study, consisting of a mail survey of RAM Broadcasting paging subscribers in nine states, including Oregon, found a 6.5% probable penetration rate (± 2%, no confidence level provided).

[18] For example, AMCOM's assumption that existing users of private and common carrier mobile services would constitute a group of likely cellular users is a reasonable assumption on which to test penetration rates among persons likely to use cellular.

[19] *See Chicago Final Decision,* at para. 26 & n. 23 (assumption regarding the rate of business growth for the purpose of predicting future demand is reasonable).

demand.[20] Similarly, AMCOM's demand distribution methodology, in which it adjusts demand of individual census tracts according to indicia of cellular use, is unexplained.[21]

26. *CMS' demand assessment.* CMS relied on the same mix of demand studies we scrutinized in our *Chicago* and *Pittsburgh* decisions. See *Chicago Final Decision,* paras. 17-21 and *Pittsburgh Final Decision,* para. 20. In addition, Graphic Scanning Corporation (Graphic), one of the partners in CMS, conducted a telephone survey of Portland businesses and a mail survey of Portland businesses most likely to use pagers. CMS does not explain how the Portland surveys were used in assessing the possible usage rate for its cellular system in Portland. A study conducted by the Claritas Corp. attempted to determine the demand for paging units in Portland, based on the mix of persons within certain standard industrial classifications likely to be pager users. A pager usage rate for these groups was based on a study of four or six unnamed markets. Another study, conducted by Westat, Inc., consisted of a telephone survey of businesses in the top 30 markets concerning probable cellular use. Seventy-eight interviews were completed in Portland. From the results of these and other studies, CMS asserts that it was able to categorize the major MSAs according to relative demand for cellular service, measuring the need per thousand units of population. CMS states that Portland has a projected need of six units per 1,000 population.[22] CMS projects that, on the basis of the above analysis, there will be a need for 7,452 cellular units in Portland in the fifth year of operations.

27. The judge found CMS' demand assessment to be flawed in several respects. CMS assumed in its Claritas study that paging is a precursor of cellular, so that national demand for paging units somehow correlates to demand for cellular units in Portland. CMS also assumed, without documentation, that businesses would be the primary users of cellular. *See I.D.,* para. 79.[23] Furthermore, the *I.D.* found that CMS failed to

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[20] AMCOM excepts to the judge's findings that the ADL survey was unnecessarily restricted to managers and executives, without explanation of the limitation. On examination of the record we find that the survey included sales and service personnel. AMCOM App. Vol. III, Appendix C at C-1. This modification to the judge's findings, however, does not alter our conclusion that AMCOM's demand study is flawed due to its unfounded assumption of a portion of the probable cellular penetration rate.

[21] We also reject AMCOM's attempt to earn comparative credit for its projections of future demand, which take into account state law restricting the growth of urban areas. Because the demand assessment is itself flawed, we cannot award a preference based on AMCOM's assessment of future demand.

[22] CMS states that the average demand rate in Portland will be .0060 per 1,000 population. CMS obviously means "6" per 1,000 population.

[23] CMS' approach should be contrasted with AMCOM's, who also assumed that conventional mobile services usage would be an indicator for cellular use. In AMCOM's case, those businesses likely to be mobile users were surveyed regarding their probable cellular use.

demonstrate how the Portland surveys were used to derive the 6 per 1,000 population demand rate, and that the demand rate itself is unexplained. The *I.D.* also faulted CMS for failing to explain its demand distribution in years 1-4 and how CMS distributed demand geographically. *I.D.*, para. 23, 24.

28. CMS' exceptions to these findings are identical to the exceptions it raised in the *Chicago* and *Pittsburgh* proceedings.[24] We find the resolution of the issues there to be dispositive, and in agreement with the judge's analysis of flaws based on the record developed in Portland.[25] Accordingly, we find no basis to reverse the judge's conclusion that CMS is not entitled to a preference for its demand assessment.

29. *Interstate's demand assessment.* Interstate conducted two studies of the Portland market, although it primarily relied upon one, the Compucon, Inc. study, in designing its system. Compucon selected certain occupations likely to be "high potential users," based on its own judgment as to what groups should be included. Compucon found the number of persons employed within these categories and applied the national mobile penetration rate to the total number of high potential users in order to obtain the probable cellular demand level for the first year. Compucon also analyzed the growth in pager sales over a 12 year period to project probable growth in demand for cellular. Compucon distributed initial demand around the MSA by analyzing demographic factors related to cellular use by census tract. Interstate's second study consisted of a survey of Portland businesses conducted by Gilmore Research Group. Based on the survey results and assuming a one-half market share, Gilmore predicted a first year demand of 543 units. Compucon, by comparison, found a demand of 523 units based on a one-third market share.[26]

30. The *I.D.* found the Compucon study to be flawed due to its reliance on secondary data. Further, the demand assessment from the Gilmore

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See supra para. 22. CMS simply assumed that a national paging usage rate, weighted to account for Portland demographics, would have some bearing on predicting cellular use.

[24] CMS argued that the assumption of paging use as a precursor of cellular is reasonable, that its studies of business users are unassailable because businesses will be the primary users of cellular and that it demonstrated a link between its market research and demand findings. For treatment of these issues, see *Chicago Final Decision*, para. 26 and *Pittsburgh Final Decision*, para. 21.

[25] CMS also takes exception to the judge's statement, *I.D.*, para. 24, that CMS' demand distribution is suspect because the estimated demand in cells 1, 2, and 3 for years 1-5 increase at the same rate. We agree with CMS that this aspect of its demand assessment does not render its distribution flawed. CMS' system is designed with significant cell overlap, and therefore three cells may increase at the same rate over time.

[26] Although the total demand figures for the first year are roughly comparable, Gilmore's demand projections for subsequent years far exceed those predicted by Compucon. *Compare* Interstate Vol. II Ex. 12 at 56 with Interstate Vol. II Ex. 13 at 13.

study contradicted the results from the Compucon study, creating doubts as to the accuracy of the Compucon study Interstate adopted in designing its system. The *I.D.* also faulted unjustified assumptions used in designing the Compucon study, such as the assumption that national mobile penetration rates or the growth in the paging industry can be directly applied to forecasts of cellular demand. *See I.D.,* para. 77.

31. CMS argues that serious flaws in Interstate's demand assessment warrant a comparative demerit. CMS argues that Interstate's use of secondary data, its use of a one-third initial market share assumption, and its unjustified assumptions regarding the application of mobile and paging data to cellular are totally without foundation.[27] AMCOM also argues that Interstate's one-third market share assumption is erroneous, and accuses Interstate of manipulating this factor in order to design a system which is consistent with its financial ability.

32. We cannot agree with the arguments made by CMS and AMCOM. Interstate's assumption that it will initially capture only one-third of the market demand for cellular is conservative and reasonable, in view of Interstate's explanation that a conservative estimate was used because of its concern about the impact of the wireline carrier's potential headstart in offering service. Additionally, the use of secondary data does not by itself warrant a demerit. Much information can be gleaned from an analysis of secondary sources. In Interstate's case, however, the information derived from secondary sources did not go far enough in explaining potential demand for cellular, given the questionable assumptions.[28]

33. Interstate argues it deserves a preference for relative demand based on its demand distribution methodology, as the Separated Trial Staff suggested. *See* STS Proposed Findings of Fact, para. 64. We disagree. Even if Interstate had exhibited a flawless distribution analysis, the other flaws in its assessment of demand discussed in para. 30, *supra*, prevent us from awarding Interstate a preference on this issue. Accordingly, we affirm the judge's decision not to award Interstate a preference for its demand assessment.

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[27] CMS' argument that Interstate has designed an undersized system will be addressed *infra* at paras. 44-48.

[28] Although we affirm the judge's overall finding regarding Interstate as specified in para. 30, we disagree with his use of the inconsistent findings of Interstate's studies as evidence that the Compucon study is flawed. Interstate has adequately explained why it chose to utilize the Compucon study. *See* Interstate Reb. Ex. 9 at p. 3. Thus, there is no basis to penalize Interstate for inconsistent results in its demand studies. In addition, we reverse the judge's finding regarding Interstate's use of secondary data insofar as he held that use of secondary data is *per se* undesirable. *See I.D.,* para. 77. This finding, however, does not alter our affirmation of the judge's overall holding that Interstate's demand analysis suffers from serious flaws.

34. *MCI's demand assessment.* MCI adopted the same approach in evaluating demand in Portland as it did in Pittsburgh. *Pittsburgh Final Decision,* para. 18. MCI primarily relied on a study designed by SRI International, Inc., which included a survey, conducted by Chilton Research Services, of 807 primary wage earners in Portland whose total household incomes exceed $20,000 per year before taxes. Respondents were questioned on whether they or their employers would be interested in subscribing to cellular service. The gross potential demand for these services was reduced by an Intent Translation Scale to account for "yea-sayers," leaving MCI with a total realizable demand of 17,400. MCI Vol. 2 Ex. 28. MCI asserts that it then applied various factors to derive a first year demand of 900. MCI Vol. 2 Ex. 29.[29]

35. The *I.D.* found the MCI study "somewhat" flawed. The judge objected to surveying primary wage earners to determine probable business demand for cellular because MCI failed to establish the authority of respondents to answer on behalf of their employers. The judge also found that MCI had not established how it derived its demand estimates for the first five years of operation. *I.D.,* para. 80.

36. MCI argues that, in accordance with the preference that it received in the Pittsburgh Final Decision, it should be awarded a preference for its demand assessment in this proceeding. After carefully reviewing the record in this proceeding and that of the *Pittsburgh Final Decision,* we conclude that MCI deserves a slight preference for its demand assessment. The major reason that the judge in this proceeding did not give MCI a preference on this issue is MCI's failure to detail how it converted its estimate of total realizable demand to its five-year demand projection. While it is true that MCI did not provide extensive details to substantiate how it computed its five-year subscriber estimate, it did give a general explanation about the factors it used to formulate its projection. *See I.D.,* at para. 28. Most important, when each applicant's demand survey is reviewed as a whole, we conclude that MCI's study is more reliable than the other studies.[30] Accordingly, we will award MCI a slight preference on this subissue.

[29] As in *Pittsburgh,* MCI also reported two qualitative investigations into cellular demand. One survey consisted of 100 interviews, in Portland, of five industrial sectors likely to have an interest in mobile. The second study consisted of two focus group sessions in Dallas and Los Angeles. *I.D.,* para. 29.

[30] As discussed above, the other studies contain serious flaws rendering their demand estimates questionable. AMCOM effectively assumed half of its total penetration estimate, CMS appears to have arbitrarily selected a penetration rate. Interstate relied on questionable assumptions in calculating total penetration by reference to other mobile penetration statistics.

Ability to accommodate local demand.

37. The *I.D.* did not award a preference to any applicant for ability to accommodate local demand, finding that all the applicants could accommodate the initial demand which they project. *I.D.*, paras. 81-82. Each of the applicants has excepted to the judge's decision, arguing that its system best accommodates initial demand.

38. *AMCOM's design.* AMCOM's initial system consists of six cells capable of serving 2,444 units, making AMCOM the largest system of the four proposed, in terms of capacity. All cells will operate in an omnidirectional pattern during the first five years of operation. No frequencies will be reused until year five, and therefore co-channel interference will be nonexistent. The system has been designed on the basis of a peak channel load of .03 erlangs per subscriber. Expansion will begin when the grade of service in any cell approaches .05, as measured by the master switch. *I.D.*, paras. 30-32.

39. AMCOM argues that its design should be preferred because it accommodates more demand than Interstate, CMS, or MCI.[31] MCI argues that AMCOM's design should be faulted because AMCOM's ADL study shows an initial demand of 2,685, several hundred more than what the system is designed to accommodate. MCI further objects to the judge's refusal to allow its analysis of ANCOM's adjacent channel interference into the record. MCI Reb. Ex. 4 pp. 6-11. MCI alleges that, based on FCC Report No. R-6406 "Technical Factors Affecting the Assignment of Facilities in the Domestic Public Land Mobile Radio Service" by Roger B. Carey (Carey Report), adjacent channel interference will occur in certain areas due to cell overlap and the placement of channel groupings. *See* MCI Reb. Ex. 11 pp. 93-110 and Interstate Reb. Ex. 12 p. 19.

40. We disagree with both AMCOM's and MCI's arguments and decline to give AMCOM a preference or a demerit for its ability to accommodate demand. The fact that AMCOM has designed its system based on a higher level of predicted demand is not a basis on which AMCOM can be preferred. Where, as here, all demand assessments are flawed, the Commission will evaluate ability to accommodate demand independently of the demand levels predicted by the applicants. Accordingly, the critical factor is the demonstration of the nexus between the demand survey results and the cellular system design. *See Chicago Final Decision,* at para. 25. We also reject MCI's argument that AMCOM's system cannot accommodate the projected demand. AMCOM explains that the 2,685 units of demand which ADL determined existed represented the entire MSA, and that the figure was reduced to 2,444 to include only the

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[31] AMCOM also argues that it should be preferred because its advertising budget is larger, assuring that demand will reach its full potential. We disagree. Advertising budgets are too speculative to be a basis for comparative evaluation in the cellular service.

demand within the CGSA. While AMCOM should have explained in its direct case how the demand estimate was reduced, its explanation is reasonable and does not reflect adversely on its ability to accommodate demand. We further reject MCI's argument that the judge incorrectly disallowed its Carey analysis, allegedly demonstrating adjacent channel interference. The Carey Report does not address adjacent channel interference. *See Chicago Final Decision* at n. 37; *Pittsburgh Final Decision* at n. 23; *see also I.D.*, para. 81. Furthermore, the Commission has stated that some degree of intra-system interference can be expected in maturing cellular systems and that such interference can be easily managed by fine-tuning. *Chicago Final Decision,* para. 40 and *Pittsburgh Final Decision,* para. 43.

41. *CMS' design.* CMS has proposed an eight cell system sufficient to satisfy its estimated demand through year five. Capacity of the system was determined by assuming .026 erlangs of traffic per subscriber and a .01 grade of service, which drops to .05 in years four and five. *I.D.*, paras. 33-35.

42. CMS argues that its system design is superior to the other proposals and, thus, deserves a preference. Interstate opposes CMS' position arguing that CMS' design is unrelated to its Portland demand assessment. *See* Interstate Reb. Ex. 13 p. 3 and AMCOM Reb. Ex. III-B, p. 5-6. Interstate further argues that the judge's admission on rebuttal of CMS' first year plan into the record was erroneous because it includes new information not contained in CMS' direct case. Consequently, CMS' plan has not been subject to the same scrutiny as the plans of the other applicants, because first year plans were not submitted until after rebuttal evidence was due.

43. Because CMS has failed to demonstrate a nexus between its demand assessment and design, we are not awarding CMS a preference for its ability to accommodate demand. *See Chicago Final Decision,* para. 30. In addition, we find that the judge did not commit error in accepting CMS' first year plan because the exhibit merely amplified information already presented in more general terms in CMS' direct case. Interstate had an opportunity to submit objections to CMS' first year plan and in fact did so.

44. *Interstate's design.* Interstate proposes a six cell system employing omnidirectional antennas. Interstate will install initially 33 voice channels, which it estimates will be sufficient to serve 523 units. Interstate has designed its system based on a traffic assumption of .0167 erlangs per subscriber and a grade of service of .02. Frequency re-use is not anticipated during the first years of system operation. *I.D.,* paras. 36-37.

45. CMS and MCI argue that, contrary to the judge's findings, Interstate cannot accommodate the levels of demand it predicts. CMS states that Interstate has designed its system based on an unrealistic system usage per subscriber estimate, and that its use of only 33 voice channels is entirely inadequate.[32]

46. We find these arguments unpersuasive. The Commission has not adopted a single standard for subscriber usage or holding time in the design or operation of cellular systems. In the absence of such a standard, we cannot agree that Interstate's assumption is erroneous. *See Chicago Final Decision,* at n. 32. In fact, Interstate's erlangs per subscriber assumption exceeds the standard applied to conventional mobile services in Section 22.16(b)(3)(ii) of our rules (adopting a standard of .9 minutes per unit, or .015 erlangs, as the average busy hour call length per subscriber unit). Accordingly, we have no basis on which to find that Interstate's assumptions regarding call length are unreasonably low.

47. MCI argues that Interstate deserves a demerit for failing to locate a transmitter and antenna system that provide line of sight transmission to downtown Portland. MCI argues this omission will result in terrain shadowing, causing a reduction in cell two's reliable service area. We reject MCI's arguments. The judge rejected these identical contentions, *I.D.,* n. 8, and MCI has provided us with no persuasive arguments as to why the judge was wrong.

48. Interstate also takes exception to the judge's findings, seeking a preference for being the only applicant to have based its channel plan on its demand studies. *See* Interstate Vol. I Dir. Ex. 1, at 123-24; *I.D.,* para. 90. We find that Interstate is not entitled to a preference on this issue. Interstate has failed to demonstrate that it accommodates demand any better than other applicants, who have also based their channel plans on their demand studies. Accordingly, no preference will be awarded.

49. *MCI's design.* MCI's proposed system consists of one sectorized cell covering the downtown area and five other omnidirectional cells. The system is configured with 123 voice channels to accommodate most of the demand through year two. MCI has designated its system for a holding time of .04 erlangs per subscriber and a grade of service of .02. *I.D.,* paras. 38-39.

50. MCI argues that its proposal warrants a preference because its system is equipped to handle its year two demand in year one, and therefore can accommodate any unanticipated demand which might arise without resorting to the addition of channels. We disagree with MCI's argument. Each applicant has demonstrated that it can accommodate the

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[32] MCI recalculates Interstate's capacity based on an assumption of .04 erlangs per subscriber and finds that Interstate's system will accommodate 312 units in the first year.

demand it forecasts and, as discussed in paras. 60-84, *infra*, each has proposed expansion plans which are capable of meeting any unanticipated demand.

51. Interstate seeks to discredit MCI's initial system, arguing that MCI has not provided a specific explanation of its cell-by-cell loading or channel assignments. Interstate Reb. Ex. 13, p. 13. Interstate argues that MCI's design is unrelated to its demand. As an example, Interstate argues that MCI allots 12 voice channels to cells one and six, even though cell one covers 130,000 more persons.

52. Interstate fails to support its argument. Differences in the capacity of cells, in comparison to population, can be explained by differences in demand levels. While MCI has not provided a detailed showing of how demand is distributed among its cells and is not, therefore, entitled to a preference, Interstate has not demonstrated that MCI's design is inadequate to meet the distribution of demand MCI predicts. Accordingly, we reject Interstate's arguments.

53. We therefore affirm the judge's finding not to award a preference to any applicant on this subissue, and we reject the applicants' attempts to discredit their competitors' design proposals. All proposals are capable of meeting the demand levels predicted, and, therefore, no one will be given a preference.

54. *Ability to accommodate roamers.* All of the applicants propose to serve roamers, utilizing various registration techniques and proposing various rates. The *I.D.* awarded a slight preference to CMS for its roamer access number plan, which simplifies a roamer's ability to gain access to the system. *I.D.*, para. 84. The judge, however, found that CMS' slight preference was outweighed by a moderate preference awarded to Interstate for its proposed roamer rates and superior highway coverage. *I.D.*, para. 85.

55. CMS takes exception to the judge's findings, arguing that it deserves a further preference for its access number proposal. AMCOM also seeks a preference for its proposal to allow automatic access to its system for previously-registered roamers.

56. The proposals for which CMS and AMCOM seek preferences go to the treatment of roamers by the systems and do not relate to the system's ability to accommodate roamer traffic. *See Chicago Final Decision*, para. 31. Accordingly, we reverse the judge's finding that CMS is entitled to a slight preference on this issue. For the same reasons, we reverse the judge's finding that Interstate should receive a moderate preference based on its proposed roamer rates.

57. Both MCI and AMCOM object to the roamer preference awarded Interstate for its superior highway coverage. MCI argues that no preference is warranted because the additional highway area which

Interstate serves has low traffic volume and therefore Interstate's coverage is substantially the same as the other applicants' coverage. AMCOM argues that a roamer preference awarded on the basis of amount of highway served amounts to a double credit for coverage of geographic area.

58. We reject both MCI's and AMCOM's arguments. MCI, attempting to establish that Interstate's highway coverage is not superior to the other proposals, cites its own exhibit concerning quality of coverage. *See* MCI Reb. Ex. 2, pp. 58-89, Att. C. The statements made in the exhibit, however, do not provide any evidence on which to reverse the judge's finding that Interstate has superior highway coverage. *See also* Separated Trial Staff Proposed Findings of Fact, para. 7 (showing that Interstate's initial system misses 206,050 ADTs, while MCI's misses 437,050). Nevertheless we reverse the judge's finding that Interstate is entitled to credit for ability to accommodate roamers. One of the reasons cited by the judge for giving Interstate a preference for its area and population coverage was Interstate's superior highway coverage. *I.D.*, paras. 73-74. Superior highway coverage is a factor relevant under the geographic area analysis, and should not be considered for the purposes of evaluating an applicant's ability to accommodate roamer demand. Accordingly, we modify the judge's decision and deny Interstate a preference on this subissue.

59. In summary, under the subelements of issue (a) we have awarded a moderate preference to Interstate for its geographic area and population coverage, and a slight preference to MCI for its assessment of relative demand. No applicant was preferred for its ability to accommodate local or roamer demand.[33]

III. Issue (b)

60. This issue involves a comparison of an applicant's proposal for expanding its system capacity in a coordinated manner within its proposed CGSA in order to meet increasing demand. *See Pittsburgh Final Decision,* at para. 33 *Chicago Final Decision,* at para. 30. The *I.D.* awarded a preference to AMCOM and Interstate for their expansion proposals. *I.D.*, para. 95. The judge declined to award a preference to MCI because its plan was overly generalized. *I.D.*, para. 91. CMS did not receive a preference due to various technical problems the judge found with CMS' proposal. *I.D.*, para. 92.

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[33] Although the winning applicants in *Chicago* and *Pittsburgh* received slight preferences under the geographic area and population subissue, a moderate preference in this case is warranted because the differential in coverage area here is greater than the differential in *Pittsburgh* and *Chicago.*

61. *AMCOM's expansion plan.* AMCOM proposes to add channels to its initial cells until all available channels are in operation. Beginning in year four, AMCOM will add omnidirectional cells to the system, and will sectorize the most active of these beginning in year five. Finally, the sectorized cells will be split, creating a four-cell sector reuse pattern. AMCOM Vol. II, Section II, Part G.

62. The judge found that AMCOM's plan follows a theoretically sound progression of expansion. The judge did not find any fault with the addition of a new omnidirectional cell in year four because the cell facilitates frequency re-use when the system is sectorized at a later date. In addition, the judge found that the channels allocated to each frequency group in AMCOM's channel plan are capable of 630 KHz spacing, the minimum amount of spacing required on the equipment AMCOM proposes to use. *I.D.,* paras. 88-89.

63. CMS excepts to the *I.D.'s* findings that AMCOM's expansion plan follows a logical progression. According to CMS, AMCOM's plan is uncoordinated because it does not efficiently utilize equipment and proposes cell splitting prior to sectorization. CMS states that sectorization is a less expensive and less disruptive alternative to the addition of new cells when a system seeks to add capacity.

64. We reject CMS's argument.[34] No preferred technical or economic hierarchy of expansion technique has been established for maturing cellular systems. In the absence of an established hierarchy, the Commission will encourage different approaches to system expansion, recognizing that individual approaches will balance long term and short term costs in different ways. *See Cellular Communications Systems,* 86 FCC 2d 469, 505-509 (1982).[35]

65. CMS, the Separated Trial Staff and Interstate object to the judge's finding on the ground that AMCOM's frequency plan includes channel groups which cannot be combined on the same antenna using the equipment which AMCOM proposes. These parties argue that AMCOM's proposal requires 120 KHz spacing between channels, which will result in extensive signal attenuation. The Separated Trial Staff states that the

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[34] CMS has raised the same argument against MCI's expansion plan. We reject this attack on MCI's proposal for the reasons stated above.

[35] Interstate further argues that the addition of a new cell in year four violates the principle of uniform spacing and reduces AMCOM's ability to reuse frequencies. We have rejected the identical argument, made against CMS, in our Chicago and Pittsburgh decisions. Chicago Final Decision, paras. 40-41 and Pittsburgh Final Decision, paras. 40-41. Uniform spacing of cells is not required, and there is no inference that a lack of uniform spacing results in intra-system interference that cannot be compensated for by fine-tuning. Furthermore, Interstate's reference to AMCOM Vol. II, Section 2, Figures 3 and 4 is erroneous because the drawings are not scale depictions of AMCOM's system.

system will experience interference as a result of this problem beginning in year five.

66. This argument is rejected. It is premised on the belief that AMCOM will use one combiner for each sectored cell. AMCOM has not provided a detailed proposal concerning the number of antennas and combiners it will construct in its cells once they are sectorized. By using more than one combiner, AMCOM can easily achieve the 630 KHz spacing required by the equipment. We therefore agree with the judge's finding that AMCOM's frequency proposal is capable of 630 KHz spacing. Nor do we find AMCOM's lack of specificity on this issue warrants a reversal of the preference its received for its expansion proposal. AMCOM proposes to develop its system in a coordinated manner to meet its anticipated levels of demand, and has, in comparison with the other Portland applicants, set forth its proposal in sufficient detail to warrant comparative credit.[36]

67. *CMS' expansion plan.* CMS has configured its eight cells to meet the level of demand it anticipates in year five, although the system will initially only use the number of channels necessary to meet initial demand. All eight cells will be omnidirectional through year four. In year five, CMS will employ a four cell re-use system, in which cells one through seven will be sectorized. *I.D.*, paras. 44-45.

68. The *I.D.* found that CMS' expansion plan suffers from potential interference problems. Specifically, the judge found that three pairs of cells using the same channels are located too close together to insure interference-free operation. The judge noted that while the Commission has not adopted a methodology to determine if co-channel interference exists, his findings are based on "the fundamental principle that the spacing between cells should follow as uniform a pattern as possible . . . ." *I.D.*, n. 25. The judge concluded that CMS' plan would require extensive fine tuning. *I.D.*, para. 92. In addition, the judge faulted CMS for designing its system based on the fifth year of demand, a design which the judge found results in loss of flexibility.

69. CMS has excepted to the *I.D.'s* conclusions regarding its expansion plan. CMS argues that there is no co-channel interference methodology which has been adopted as the definitive methodology. CMS also argues that its system will not require fine-tuning which is qualitatively or quantitatively different from other applicants' systems. The other parties, in response, argue that even if intra-system interference is not a problem,

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[36] Interstate also argues that AMCOM's expansion plan is suspect because the number of channels in cells 1, 2, 3, 6 and 7 decreases over time, despite the implementation of sectorization. As AMCOM stated in its reply, the number of channels in a cell may decrease as a function of cell splitting, even though the number of channels in a given area will increase.

CMS deserves a demerit because its design is based on the fifth year of operations, and is therefore less flexible.

70. The conclusion that CMS' system suffers from co-channel interference because three pairs of cells will use the same frequencies must be reversed. As the judge recognized, no definitive methodology for detecting possible co-channel interference exists. *I.D.*, n. 25. Moreover, the Commission has rejected the notion that cellular systems must consist of uniformly spaced cells. *Chicago Final Decision*, para. 41 and *Pittsburgh Final Decision*, para. 41.

71. We also reverse the judge's finding that CMS' design should receive a demerit because it will require significant fine tuning. As we stated in our *Chicago* and *Pittsburgh orders, supra,* intra-system interference is to be expected in a maturing cellular system. As a result, every system can be expected to engage in fine-tuning to remedy intra-system interference.

72. The judge's decision that CMS' system is less flexible because its design is based on the fifth year of demand must also be rejected. All four systems proposed in Portland have between six and eight cells and remain essentially static in terms of cell configuration during the first five years of operation.[37] Growth in demand is accommodated through the addition of channels. Under these circumstances, we fail to see how CMS' proposal retains less flexibility merely because its cell configuration is based on the fifth year of operation.[38]

73. Our finding that CMS' plan does not suffer from the defects named in the *I.D.* compels us to award the same comparative credit to CMS as we have to AMCOM and Interstate. Our review of CMS' plan demonstrates that CMS has provided similar information regarding its overall expansion plans, as well as a cell by cell breakdown of subscribers by cell through year five. Accordingly, CMS deserves the same comparative credit as that awarded AMCOM and Interstate.

74. *Interstate's expansion plan.* Interstate proposes to expand its six-cell system by adding channels through year nine. Beginning in year ten, Interstate will sectorize cells 2 and 3. In year eleven, Interstate will begin cell splitting, eventually employing a twelve-cell reuse pattern. Throughout its expansion, Interstate states that it will maintain a grade

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[37] AMCOM begins with six cells and adds a seventh in year four. Interstate begins with six cells and does not add additional cells until year eleven. MCI does not specify when it will add cells to its six cell system, but given its demand projections through year five, it is unlikely to add a significant number of cells.

[38] Our finding here is not inconsistent with our conclusions in *Chicago* and *Pittsburgh,* where we found that CMS' design was less flexible than its competitors' designs. Those cases involved much larger initial systems and required significant expansion in the first few years of operations. Chicago Final Decision, at para. 43 and Pittsburgh Final Decision, at para. 45.

of service of .05. The judge found Interstate's plan evidenced an understanding of cellular design and expansion principles and was deserving of a preference. *I.D.*, para. 90.

75. AMCOM excepts to the decision to award a preference to Interstate. AMCOM argues that Interstate has erroneously discounted subscriber airtime usage with the result that expansion of the system will occur at too slow a rate to accommodate demand.

76. We disagree with AMCOM's argument. There are no industry standards regarding subscriber usage, as AMCOM itself admits. AMCOM Reb. Ex. III - B at 6. As we noted above, Interstate's usage estimates appear reasonable. See para. 46 *supra*. Interstate is free to choose any reasonable figure as a basis on which to design its system.

77. CMS argues that Interstate's plan is vague and not entitled to a preference. CMS criticizes Interstate for failing to indicate the number of subscribers per cell as expansion occurs. CMS further faults Interstate for failing to provide specific channel assignments.[39]

78. We find Interstate's expansion plan to be sufficiently specific for the Commission to determine that Interstate can meet future demand for cellular service in Portland. A cell-by-cell subscriber forecast is not required by the Commission's rules as part of an applicant's expansion analysis. Similarly, our rules do not call for specific channel allocations. However, Interstate does provide a listing of the number of channels to be used in each cell, and the frequency group from which these channels will be assigned. Interstate Vol.I, Ex. 1 at pp. 108-116. This information is adequate enough for the Commission to determine whether the applicant has presented a workable expansion proposal.[40] Accordingly, Interstate is entitled to comparative credit on this issue.

79. *MCI's expansion plan.* MCI has proposed a six cell system with sufficient capacity to accommodate demand through most of the second year. MCI states that it will expand its system by adding channels, borrowing channels, adding sites, sectorizing and cell splitting. MCI states that the process of adding channels and additional sites will begin in year three, and that the system will eventually employ a seven-cell re-

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[39] CMS also argues that Interstate's decision to sectorize before using the full complement of channels assigned to it is unnecessary and results in lost trunking efficiencies. We reject CMS' argument. CMS has failed to show that Interstate's sectorization of cells 2 and 3 in year nine adversely impacts Interstate's ability to serve the market.

[40] CMS also argues that Interstate does not deserve a preference on this issue because the criteria for maintaining its grade of service are vague. Although we agree that Interstate's grade of service proposal could be more detailed, the judge's award of a preference for Interstate's expansion plan is not predicated on its grade of service representations. Because we have found Interstate's overall plan to be comparatively superior, along with AMCOM's and CMS', we will award Interstate comparative credit on this issue.

use pattern. Throughout this process, MCI expects to maintain a grade of service of .02. *See* MCI Vol. 1 App. Ex. 5 and Vol. 2 Dir. Ex. 21 at 18-23.

80. The judge declined to give MCI a preference for its expansion proposal. The judge found MCI's proposal to be flexible but vague. Further, while MCI states that its expansion plans will be initiated in order to maintain its .02 grade of service, specific "take-action" criteria have not been provided. *I.D.,* para. 49-50.

81. MCI excepts to the judge's findings, arguing that the level of detail which the presiding judge seems to require is contrary to Commission policy of encouraging flexibility. MCI states that its expansion proposal is fully set forth in MCI Vol. 1, Dir. Ex. 4 and Vol. 2 Ex. 21.[41]

82. We affirm the judge's decision not to award a preference to MCI here. MCI discusses expansion of its system only up through year two, as compared to the other applicants, who provide expansion plans for at least a five year period following implementation of their systems. The statements which MCI did make regarding future expansion are generic and do not relate specifically to the Portland market. *See* Vol. 2 MCI Dir. Ex. 4 and Ex. 21.[42]

83. Based on the above analysis, we affirm the judge's decision to award comparative credit to AMCOM and Interstate for their expansion proposals, and additionally find CMS' plan worthy of identical credit. The three plans are comparatively superior to MCI's plan, which lacks detail and does not relate specifically to its Portland proposal.

84. We decline, however, to award a moderate preference to AMCOM, CMS and Interstate.[43] None of the applicants demonstrate that any of their competitors will be less able to accommodate the expected growth in demand. With the exception of MCI, whose proposal is too vague to merit

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[41] MCI also argues that its proposal should be preferred because it easily coordinates with adjacent cellular systems, due to its use of 630 KHz spacing. In our Chicago decision, however, the Commission said it would not embrace one reuse design for coordination purposes. *Chicago Final Decision,* at para. 38 and n. 33. Furthermore, there is no way at this time to determine what reuse pattern adjacent systems will use. Accordingly, no preference is warranted.

[42] In addition, we disagree with MCI's allegation that the Commission does not require the submission of revised channel plans. All cellular systems are required to file current information with the Commission regarding which frequencies are in use, and at what locations, in order to facilitate spectrum management and assist in intersystem coordination. Cellular Communications Systems, 86 FCC 2d 469, 509-510 (1982); 47 C.F.R. §22.902(a).

[43] Our decision to award a slight preference here is consistent with our *Chicago Final Decision, supra,* para. 43. There, a slight preference was awarded, even though both systems were found to be able to accommodate future demand, because the winning applicant's expansion plan was found to be more flexible. In this case, we are awarding only a slight preference because the expansion plans of AMCOM, CMS and Interstate, while better than MCI's plan, are merely adequate, and not exceptional in any way.

comparative credit, the applications demonstrate that the proposed systems will accommodate future growth. Accordingly, we award a slight preference to AMCOM, CMS and Interstate for their expansion plans.

IV. Issue (c)

85. This issue calls for a comparison of specific portions of the applicants' proposals relating to services, rates and charges, maintenance, personnel, practices, classifications, regulations and facilities. *See Pittsburgh Final Decision* at para. 46, *Chicago Final Decision,* at para. 44. Preferences awarded on this issue are not entitled to as much weight as preferences awarded under Issues (a) and (b) because Issue (c) is not as significant as the other designated issues. 86 FCC 2d at 503. The judge awarded CMS a preference for its rate structure, but declined to award any other preferences. We affirm the judge's finding as to CMS, but modify his finding as to MCI.

Service Offerings

86. The judge found that all applicants proposed a number of service offerings, but that only MCI had demonstrated that a demand existed for these services. *I.D.,* para. 97. The judge reasoned, however, that MCI did not deserve a preference because MCI's offerings were substantially identical to those offered by the other applicants.

87. MCI and AMCOM have excepted to the findings in the *I.D.* MCI argues that it deserves a preference because it demonstrated that demand existed for its proposed services, and that it specifically questioned prospective subscribers in its demand surveys of the Portland market. AMCOM argues that it demonstrated demand for its intercity least cost routing feature, which is capable of routing a long distance call to the interexchange carrier able to complete the communication for the lowest cost at the time the call is made.

88. We find that MCI is entitled to a slight preference for its proposed service offerings. In the *Chicago* decision, the Commission stated that no credit can be given for service offerings unless an applicant can demonstrate demand for the offerings proposed. *Chicago Final Decision,* para. 46. Absent such a requirement, applicants would have an incentive to propose unnecessary and unneeded services in an attempt to gain comparative advantage. MCI explored potential demand in two of its demand studies.[44] The SRI survey of Portland wage earners showed that a majority of potential subscribers are interested in the following features: call forwarding, conference calling, automatic redialing, speed calling, "911", and call waiting. MCI Vol. 3 at V-21 and Table V-14. These findings were confirmed by focus group inquiries conducted in Los

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[44] None of the other applicants made similar showings.

Angeles and Dallas. MCI Vol. 3 App. 2 at 27. However, many of these service features are typically offered as a function of the customer's mobile units (*e.g.*, redial, speed calling, 911), which the customer will purchase or lease in a free marketplace; accordingly, MCI will receive only a slight preference.

89. We decline to award AMCOM a credit for its least cost routing option. Intuitively, this feature would appear attractive to some consumers. Other consumers, however, may prefer that their long-distance carrier be selected on a basis other than cost. While AMCOM presents the affidavits of various expert witnesses who assert that this service will be an attractive option, AMCOM's demand assessment does not support this contention.

Rates and charges.

90. The presiding judge found that no preference would be given based on rate levels because none of the applicants demonstrated their methodology for deriving their rates, as required by *Houston Mobilfone, Inc.*, 65 FCC 2d 848, 858-9 (Rev. Bd. 1977), *remanded on the other grounds sub nom. Mobilfone Service, Inc. v. FCC,* 605 F. 2d 572 (D.C. Cir. 1979). *See also Chicago Final Decision,* para. 49.[45]

91. AMCOM objects to the judge's finding, arguing that it described the methodology by which its rates were derived. We disagree. AMCOM merely describes the schedule of proposed charges. Nowhere in the application does AMCOM relate its proposed charges to the costs of providing the service. Thus, it is impossible to evaluate whether the proposed charges can reasonably be expected to be put into effect.

92. AMCOM also argues that CMS deserves a demerit for proposing rates which are unrealistically low. Similarly, MCI objects to the judge's refusal to accept evidence that MCI's system would entail the lowest total cost to consumers. *See* Tr. 545-52.

93. We reject AMCOM's and MCI's arguments. Rate levels are not relevant to our comparison of the applicants' proposals unless an applicant has tied its rate levels to its costs. *Chicago Final Decision,* para. 49 and *Pittsburgh Final Decision,* para. 52. Because MCI has not made such a showing, its rate levels are irrelevant to our decision.[46]

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[45] CMS argues that the Houston Mobilfone case does not apply to cellular, and that an earlier case, Telanserphone, Inc. v. FCC, 231 F. 2d 732 (D.C. Cir. 1956), applies. Consistent with our decision in the Chicago case, we reject this argument. *See* Chicago Final Decision, at n. 48.

[46] MCI also argues that the Commission should evaluate whether an applicant's proposed rates are consistent with other parts of its application - *i.e.,* whether the rates are consistent with estimated expenditures and if anticipated demand can be achieved at the proposed rate levels. While MCI's argument has some appeal, the fact remains that rates for cellular service will be established by state ratemaking procedures in the first

94. The parties have raised numerous exceptions to the findings of the presiding judge concerning rate structures. AMCOM, Interstate and MCI each seek a preference for their rate structures, and seek to discredit the preference awarded to CMS in the *I.D.*

95. *AMCOM's rate structure.* AMCOM proposes to bill its customers in one minute increments, but will not bill for recorded air time of less than 20 seconds, thereby alleviating the problem of billing for incompleted calls. AMCOM Reb. Ex. IV at 3. In addition, AMCOM has provided for bulk service at discount rates for access and usage.[47] AMCOM has also established a separate fee ($10) for connection of new or additional numbers to the system, and will allow customers to obtain additional telephone numbers in different exchanges in order to avoid intra-CGSA toll charges.

96. The judge fund that AMCOM's provision of 20 seconds of free air time would be subject to potential abuse because short communications may escape billing. With respect to the bulk resale discount, the judge found that AMCOM's rate structure suffers "discontinuity" problems, referring to the argument that the proposal provides a price incentive to buy capacity not needed.[48] The judge also found that the mechanism by which AMCOM allows customers to avoid intra-CGSA toll charges, *i.e.*, registration for additional numbers, does not merit a preference where AMCOM assesses a connection fee. *I.D.*, para. 103.

97. AMCOM excepts to the judge's findings regarding its bulk discount plan. AMCOM argues that its proposal is superior in comparison to the other proposals.[49] MCI argues that AMCOM's bulk discount plan warrants a demerit because the rate structure encourages resellers to lease numbers which they do not need.

98. The judge's finding that AMCOM's bulk discount proposal is necessarily inefficient must be reversed. Under AMCOM's plan, the "capacity" which the reseller buys is the use of telephone numbers. The fact that the rate structure encourages resellers to contract for more numbers than they immediately need is neither positive nor negative until there is a shortage of numbers, at which time the supplier may have

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instance. The evaluation which MCI requests the Commission to make would thus be quite speculative.

[47] A bulk purchaser seeking to buy service for 50 to 100 units would pay $13.60 per unit instead of $16, while the per unit charge for more than 100 units drops to $10.66. AMCOM Vol. I Ex. 3 at 6.

[48] *See* MCI Reply to Exceptions at p. 23.

[49] AMCOM alleges that the bulk discount plan offered by Interstate is less desirable because it requires resellers to sign allegedly anticompetitive agency agreements. Because Interstate has not excepted to the judge's findings regarding its bulk sale proposal, we need not resolve the issue. CMS and MCI do not include bulk discounts in their proposals.

undesirable market power. In the foreseeable future, the bulk discount plan would seem to have no effect on the efficient operation of a cellular system. We decline, however, to award AMCOM a preference for its resale plan. All cellular systems are required to provide for resale. *Cellular Communications Systems,* 86 FCC 2d at 510. Because AMCOM did not show how its discount plan enhances its ability to implement its system or is beneficial to ratepayers, AMCOM is not entitled to a credit.

99. AMCOM also excepts to the judge's refusal to award a preference for AMCOM's proposal to avoid intra-CGSA toll charges. *See* AMCOM Vol. I at pp. 53-54. AMCOM argues that the judge failed to consider its proposal to allow cellular subscribers to register, at no extra charge, in the exchange area nearest to the location where most of the calls a subscriber receives would originate. Thus, the person placing the call to the cellular user would avoid intra-CGSA toll charges.

100. We disagree with AMCOM. Minimizing intra-CGSA toll charges for landline subscribers seeking to reach cellular subscribers does not in itself merit a preference. We agree with the judge that the cost of obtaining additional numbers for the purpose of placing toll free calls may well exceed the toll charges avoided. In the absence of a detailed cost-benefit analysis, we must decline to award a preference to AMCOM on this issue.

101. *CMS' rate structure.* CMS' subscribers will be billed for the first 30 seconds, and in six seconds intervals thereafter. Data transmissions are billed at a reduced rate in order to utilize idle system capacity. CMS has also adopted a three tiered rate structure, for peak (daytime), evening and night calls. The judge awarded CMS a preference for its rate structure, which the judge found encourages the most efficient use of the spectrum because it is the most usage-sensitive of the four proposals.

102. AMCOM argues that CMS discriminates against data users because CMS assigns data users lower priority access to the system. AMCOM argues that CMS should not draw a distinction between data and voice users, because it discourages efficient use of the spectrum.

103. We reject AMCOM's argument. While CMS does assign data a lower priority than voice communications, it does so only when the system is approaching maximum loading. Otherwise, the system accords equal access to data users. CMS Dir. Vol. 1, Ex. VI at pp. 17-18. Because under CMS' proposal, data transmissions are presumed to be longer in duration than voice communications, we find CMS' plan to be a reasonable attempt to accommodate voice and data users. In addition, CMS' data proposal encourages the use of idle system capacity. Based on the above analysis, we find that CMS should be preferred for its overall rate structure and for its data proposal, which we find to be comparatively superior to the other

applicants.[50] However, consistent with our previous treatment of CMS' rate structure in the *Chicago* and *Pittsburgh* proceedings, we are awarding a slight preference to CMS, instead of a moderate preference. *See Chicago,* para. 48, and *Pittsburgh,* para. 51. Award of a slight preference is warranted because the benefits of the rate structures are unproven and are subject to revision at the state level.

104. *Interstate's rate structure.* Interstate proposes to bundle its monthly access fee with 60 minutes of free airtime, as well as message waiting, message storage and retrieval, call waiting, speed calling and number recall. Calls will be billed in one minute increments, beginning on completion of a call. Interstate also proposes a bulk service discount. The judge found that Interstate's proposal includes unnecessary bundling which may discourage usage-sensitive customers or encourage waste.[51]

105. AMCOM argues that Interstate deserves a demerit for its proposals, particularly Interstate's decision to bundle the monthly access fee with 60 minutes of free airtime. We fail to see why Interstate's rate design warrants a demerit. While services offered on an unbundled basis are normally preferred, there is nothing unlawful or irrational about Interstate's proposal. It is merely less desirable than the others.

106. *MCI's rate structure.* MCI proposes to bill in 60-second intervals. MCI provides direct access to intercity services at no additional charge. MCI also alleges that it will not pass through intra-CGSA toll charges to its customers. MCI Vol. 2, Ex. 13. The judge found that MCI's proposal does not warrant a preference because its proposal is speculative and depends on the method of connection to the landline telephone company, to be negotiated at a later date.

107. MCI argues that it deserves a preference for its proposal to avoid toll charges. MCI states that it will install FX lines[52] to transmit what would otherwise be local calls from the distant mobile telephone switching office (MTSO) to the local exchange or vice versa.

108. We disagree with the judge's finding that MCI's proposal is speculative, but we decline to award comparative credit because MCI's

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[50] We also reject AMCOM's arguments that CMS does not warrant a preference because CMS bundles various features into its basic rate and additionally creates potential cross-subsidy problems. Although CMS bundles some services, we agree with the judge that CMS' rate structure is the most usage-sensitive of those proposed. Furthermore, AMCOM's charges regarding cross-subsidization are unsupported.

[51] No credit was given for Interstate's bulk discount proposal because it suffers from the same price discontinuity problems as AMCOM's. See discussion of this issue, *supra,* para. 101, where we reversed the judge's findings concerning the "efficiency" of AMCOM's bulk discount proposal, but declined to award a preference because all systems must offer resale.

[52] An FX line is a private line which terminates in a central office in an exchange area other than that in which the telephone or terminal is located.

overall rate structure is not comparatively superior, or even equal to, CMS'. CMS' proposal contains smaller billing increments more accurately reflecting the cost of the call, and utilizes a tiered pricing structure to encourage off-peak use. In addition, as discussed in para. 100, *supra,* we will not award preferences for potential avoidance of toll charges for landline subscribers, absent a cost-benefit analysis.

Personnel and Maintenance

109. The presiding judge in the Portland proceeding declined to award any preferences in this area, finding that none of the applicants' proposals will enhance their ability to construct and operate their systems. AMCOM and CMS except to the judge's finding. AMCOM argues that it deserves a preference because Western Union will be hired under contract to perform its maintenance, whereas Interstate will merely have two technicians on staff to handle maintenance. CMS argues that AMCOM and Interstate deserve a demerit for maintenance because AMCOM will trust its maintenance to another company and Interstate has presented a deficient proposal.

110. We affirm the judge's conclusion that none of the proposals warrants a preference or a demerit. The judge found that all have shown that their personnel and maintenance agreements are sufficient to implement their systems. Furthermore, none of the applicants have demonstrated how their proposals will enhance their ability to implement their systems. *I.D.,* para. 104. Thus, the parties have not demonstrated how the judge's conclusion was in error.

111. CMS also argues that it deserves a preference based on Graphic Scanning Corporation's extensive experience in mobile technology and the resources which the parent company brings to bear on cellular system design and operation. We reject CMS' argument. All four applicants have demonstrated comparable expertise. *See I.D.,* paras. 4-7 and *Chicago Final Decision,* n. 27.

Practices

112. AMCOM and CMS sought comparative credit for their proposals to promote participation by minorities and women in their operations. The judge awarded no preferences, however, because minority preferences are awarded only in mass media technologies, where the Commission has found that diversity of ownership creates diversity in programming. AMCOM and CMS take exception to the judge's finding.

113. We decline to award the requested credit, consistent with our Chicago and Pittsburgh decisions. *Chicago Final Decision* at para. 52, *Pittsburgh Final Decision* at para. 53. Moreover, the Commission has recently revisited the issue of minority preferences in common carrier technologies, and has found that no preferences should be awarded.

Cellular Mobile Systems of Tampa, *et al.*, released June 8, 1984; *see also Cellular Lottery Decision*, 49 Fed. Reg. 23628 at paras. 78-79 (1984). While the proposals by AMCOM and CMS are commendable, we cannot grant these applicants comparative credit.

114. Our comparison of the applicant's proposals under issue (c) demonstrates that MCI and CMS are entitled to comparative credit. MCI's proposal merits a slight preference because it determined that demand existed for various service offerings and designed its system to accommodate the demand. CMS deserves a slight preference for its overall rate structure.

V. *Other Issues*

115. *Regional Efficiencies.* The presiding judge, in his concluding statements, said that his decision to select Interstate as the nonwireline licensee in Portland was "further bolstered" by Interstate's previous selection as the licensee in Seattle, Washington. *American Mobile Communications of Washington and Oregon,* CC Docket 83-3, FCC 83D-55, released September 20, 1983. The judge noted that the Commission does not give weight to arguments regarding the public benefits of regional systems. But, he said that while the benefits of regional systems were not considered in reaching his decision, the selection of Interstate as the licensee in both Portland and Seattle will nevertheless "redound to the public benefit." *I.D.*, para. 110.

116. AMCOM, CMS and MCI have objected to the judge's statement, seeking remand of the proceeding. AMCOM argues that the judge's decision is tainted because it is impossible to know how the judge's decision has been "bolstered." The parties also take exception to the factual presupposition to the judge's remarks, pointing out that Seattle and Portland are not adjacent MSA's.

117. We find that the judge's statement does not require remand. Although the statement is inappropriate in view of our present cellular policy of not awarding credit based on an applicant's selection in another market, this is dictum. The judge clearly stated that the selection of Interstate in Seattle did not enter into his selection of Interstate in Portland. Our own analysis of the comparative issues, affirming much of the judge's opinion, confirms our belief that he evaluated the competing applications independently of the result in Seattle. Thus, regardless of the statements made by the judge, the Commission's evaluation of the designated issues demonstrates that Interstate is the superior applicant. Accordingly, we decline to remand the proceeding.

118. *Character.* In addition to the designated issues, AMCOM has objected to the judge's denial of a motion to enlarge the issues that AMCOM had filed against Interstate on character grounds. Interstate, in

response, filed an offer of proof addressing the arguments raised by AMCOM. AMCOM has opposed the offer of proof in a motion to strike.

119. AMCOM argues that Interstate engaged in misrepresentation, lacked candor and abused Commission processes in filing a motion to enlarge the issues against AMCOM. The motion, which was subsequently withdrawn by Interstate, alleged that, in 1983, one of the partners in AMCOM illegally intercepted paging signals for the purpose of soliciting paging customers. AMCOM alleges that, upon further investigation of this matter, it found that Interstate pressured an affiant into signing an affidavit supporting the motion to enlarge against AMCOM, and misrepresented its reasons for obtaining the affidavit. The presiding judge dismissed AMCOM's motion on procedural grounds.[53]

120. In view of the importance of resolving any character issues raised against the preliminary selectee in the Portland market, we have examined the pleadings to determine whether AMCOM has raised a substantial and material issue which warrants further hearings.[54] Based upon our examination of the pleadings, we find that no substantial and material question of fact has been raised, and that the allegations against Interstate are insubstantial. Interstate's conduct in investigating and filing its motion to enlarge against AMCOM does not merit designation of a character issue for hearing. Interstate attempted to insure the accuracy of its affiant's statements by interviewing him several times prior to drawing up the motion to enlarge. The fact that the affiant subsequently altered his statements should not reflect adversely on Interstate. Moreover, Interstate promptly withdrew its motion to enlarge against AMCOM when the affiant's amended statements were submitted by AMCOM. Accordingly, we conclude that no basis exists for believing that Interstate was acting in bad faith or attempting to abuse the Commission's processes. We therefore decline to remand this case for further hearings on this issue. We find that AMCOM has failed to raise a substantial and material question of fact with respect to Interstate's character.

VII. Conclusion

121. Based on the record before us we have concluded that, under the subissues of issue (a), Interstate is entitled to a moderate preference for its superior geographic and population coverage, and MCI is entitled to a

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[53] The judge ruled that a deposition which AMCOM sought to use to support its motion to enlarge was improper. The judge found that Section 1.321(d) of the rules prohibits use of depositions against any party where the party is not present or given notice of the deposition. Because Interstate had not been given notice, the deposition could not be used to support the motion to enlarge.

[54] Specifically, we have examined AMCOM's motion to enlarge against Interstate filed September 2, 1983, Interstate's offer of proof filed March 16, 1984, and AMCOM's motion to strike filed March 30, 1984.

slight preference for its demand assessment. Interstate, AMCOM and CMS are entitled to slight preferences under Issue (b) for their expansion proposals. Under Issue (c), MCI is entitled to a slight preference for its service proposal and CMS is entitled to a slight preference for its rate structure and data proposal. The slight preferences accorded MCI on issues (a) and (c), CMS on issues (b) and (c), and the slight preference awarded to AMCOM under Issue (b) are overshadowed by the moderate preference given Interstate on Issue (a) and the slight preference on Issue (b).[55] We therefore conclude that the public interest, convenience and necessity is best served by the grant of Interstate's application.[56]

122. Accordingly, IT IS ORDERED, That the application of Interstate Mobilephone Company (File No. 26150-CL-P-82) IS GRANTED.

123. IT IS FURTHER ORDERED, that the applications of American Mobile Communications of Washington and Oregon (File No. 26110-CL-P-82); Cellular Mobile Systems of Washington, Inc. (File No. 26183-CL-P-82); and MCI Cellular Telephone Company (File No. 26104-CL-P-82) ARE DENIED.

124. IT IS FURTHER ORDERED that the amendments submitted by Interstate reflecting a transfer of one-sixth interest to McCaw Communications of the Pacific Northwest, Inc., and reflecting the tentative decision to utilize different equipment, ARE ACCEPTED.

125. IT IS FURTHER ORDERED that the grant to Interstate Mobilephone Company IS CONDITIONED upon its obtaining the appropriate antenna structure clearances.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[55] AMCOM has petitioned the Commission for a tie-breaker lottery to be held between itself and Interstate. CMS has opposed the motion. In view of our finding that Interstate is the superior applicant in the Portland market, we deny AMCOM's request.

[56] Interstate has petitioned to amend its application to reflect the transfer by Western Telepage, Inc. (Western) of its one-sixth interest in Interstate to McCaw Communications of the Pacific Northwest, Inc. (McCaw). We accept the amendment, although we have not considered the amendment for comparative purposes in this proceeding. We also accept Interstate's amendment notifying us of its tentative decision to utilize different equipment than that specified in its application. We accept Interstate's allegation that the equipment change would not alter the configuration of the proposed system. AMCOM has opposed the amendment and has requested we reopen the record. The Separated Trial Staff has opposed AMCOM's motion to reopen. Because no comparative credit has been awarded based on the type of equipment chosen by applicants, we decline to reopen the record. In addition, CMS has petitioned to amend its application to reflect current licenses held by Graphic Scanning Corporation, its parent. Acceptance of this amendment has been rendered moot by our selection of Interstate as the cellular permittee.

DISSENTING STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON

I must respectfully dissent from the comparative award of a cellular license in this case. Once again, the majority has strained to make a comparative decision on the basis of insignificant factual distinctions.

This is admittedly a close case. In fact, the majority finds three of the applicants in virtual equipoise except for the comparative plus awarded to Interstate for area and population. Yet, the difference in population coverage between Interstate and the next highest applicant is less than one per cent; Interstate proposes 95.49%, and AMCOM proposes 94.52%. It is on this basis alone that Interstate's application is granted.

I find such differences so slight and the effect on cellular service to the public so negligible that I am unable to make a decision on the basis of the Commission's comparative criteria. Rather, this case presents another opportunity for a "tie-breaker" lottery, which the Commission explicitly sanctioned in the Pittsburgh and Chicago cellular proceedings.

FCC 84D-5

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In re Applications of	CC Docket No. 83-445
American Mobile Communications of Washington and Oregon	File No. 26110-CL-P-(6)-82
Cellular Mobile Systems of Washington, Inc.	File No. 26183-CL-P-(8)-82
Interstate Mobilephone Company	File No. 26150-CL-P-(6)-82
MCI Cellular Telephone Company	File No. 26104-CL-P-(5)-82
For a Construction Permit to Establish a Cellular System Operating on Frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to Serve the Portland, Oregon/Washington Standard Metropolitan Statistical Area	

Appearances

Henry Goldberg and *Phillip Spector* on behalf of American Mobile Communications of Washington and Oregon; *Edward P. Taptich, Lawrence C. Movshin, William K. Keane, George L. Lyon, Jr.*, and *Robert B. Kelly* on behalf of Cellular Mobile Systems of Washington, Inc.; *Carl W. Northrop, Diane B. Cohn,* and *L. Andrew Tollin* on behalf of Interstate Mobilephone Co.; *William J. Potts, Jr., John M. Pelkey,* and *Melodie A. Virtue* on behalf of MCI Cellular Telephone Co.; and *James O. Juntilla* and *Jerry M. Hermele* on behalf of the Separated Trial Staff, Common Carrier Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: January 20, 1984; Released: January 26, 1984

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of American Mobile Communications of Washington and Oregon (AMCOM), Cellular Mobile Systems of Washington, Inc. (CMS), Interstate Mobilephone Co. (Interstate), and MCI Cellular Telephone Co. (MCI) for authority to construct and operate a new cellular telephone system operating on Frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Portland, Oregon/Washington Standard Metropolitan Statistical Area (Portland SMSA).

2. By *Memorandum Opinion and Order* (Designation Order), 48 Fed. Reg. 22205, published May 17, 1983, the Chief, Common Carrier Bureau, acting pursuant to delegated authority, designated the application for hearing on the following issues:[1]

(a) to determine on a comparative basis the geographic area and population that each applicant proposes to serve; to determine and compare the relative demand for the services proposed in said areas; and to determine and compare the ability of each applicant's cellular system to accommodate the anticipated demand for both local and roamer services;

(b) to determine on a comparative basis each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed Cellular Geographic Service Area (CGSA) in order to meet anticipated increasing demand for local and roamer service;

(c) to determine on a comparative basis the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching capabilities); and

(d) to determine, in light of the evidence adduced under the foregoing issues, what disposition of the referenced applications would best serve the public interest, convenience and necessity.

3. Pursuant to the expedited procedures governing cellular radio pplications in the top 30 markets[2], the applicants filed their direct cases vith their applications on June 7, 1982. Subsequent to the May 9, 1983 elease of the Designation Order, written rebuttal cases were filed June 30, 1983. Evidentiary admissions hearing sessions were held on September 29 and 30 and October 3 and 6, 1983, at which time the Presiding Judge ruled on objections, admitted relevant exhibits into evidence, and ruled on

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[1] The Designation Order also: (1) conditionally granted the non-wireline application of GTE Mobilenet of Portland Incorporated for authority to construct and operate a cellular system serving the Portland SMSA on a separate frequency block; (2) dismissed the mutually exclusive application of Parr Communications Company; and (3) provided that any grant to CMS shall be conditioned upon the possible reexamination or reconsideration of CMS' qualifications to hold a cellular license following a decision in *A.S.D. Answer Service, Inc.*, 47 Fed. Reg. 40230, published September 13, 1982.

[2] 47 C.F.R. 22.916(b)(1).

requests for official notice, cross-examination, and surrebuttal. At the conclusion of those hearings, the Presiding Judge closed the record.[3] Proposed Findings of Fact and Conclusions of Law were filed November 8, 1983. Reply Findings were filed November 22, 1983.

Findings of Fact

I. The Applicants

4. *AMCOM.* AMCOM is a joint venture formed for the principal purpose of applying for construction permits and licenses for cellular radio systems in the Portland SMSA and certain other SMSA's in the Pacific Northwest. The participants in the AMCOM joint venture are: (1) RAM Cellular Communications of Washington and Oregon, a wholly-owned subsidiary of RAM Broadcasting Corporation which provides radio common carrier services in thirteen states and has a separate subsidiary which offers mobile telephone and paging services in Portland; (2) The Western Union Telegraph Company which provides a variety of communications services including satellite, video, data and voice transmission, and long-haul voice communications services; (3) Stellar Communications Corporation which is involved in various facets of the communications and publishing industries; and (4) Rapid-American Corporation, whose subsidiaries are engaged in the production, distribution, and sale of a variety of consumer products and services throughout the United States. (AMCOM Ex. 30, at 8-25).[4]

5. *CMS.* CMS is a Washington corporation (qualified to do business in Oregon) organized for the purpose of implementing a cellular radio system in the Portland SMSA. CMS is a wholly-owned subsidiary of Cellular Mobile Systems, Inc., which, in turn, is wholly-owned by Graphic Scanning Corp. Graphic Scanning, directly and through subsidiaries, provides a variety of specialized data and message processing and communications services, and has also been involved in cellular equipment design and propogation analysis. (CMS Ex. 1, at 1-7).

6. *Interstate.* Interstate is a partnership formed for the purpose of establishing cellular mobile telephone facilities in the Pacific Northwest. The partners in Interstate are comprised of: Kelley's Radio Telephone,

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[3] The record was subsequently reopened to permit CMS to comply with requests to supply certain documents. The record was then closed again. (FCC 83M-3962, released November 2, 1983).

[4] References to the record in this proceeding are as follows:

> All references to direct case testimony are identified by sponsor and exhibit number. For example: CMS Ex. 2; MCI Ex. 2; AMCOM Ex. 2. References to Proposed Findings are identified as, for example, MCI P.F., p. 1. References to rebuttal testimony are identified as, for example, MCI R. Ex. 2. References to the relevant applications are identified as, for example, MCI App. Ex. 1, at 1.

Inc.; Western Telepage, Inc.; Skyline Communication Services, Inc.; Pacific Porta-Phone, Inc.; and Tribune Communications Company. All of the partners are involved in the communications industry in the Pacific Northwest, including the provision of paging, mobile telephone, two-way fleet dispatch and telephone answering services, as well as broadcasting, cable, and publishing enterprises. (Interstate Exs. 3 and 4).

7. *MCI.* MCI is a wholly-owned subsidiary of MCI Communications Corporation, a specialized common carrier operating a nationwide long-distance communications network involving both voice and data transmissions through microwave relay stations. (MCI Exs. 1, 2, and 7).

II. Issue (a)

8. *Geographic Area and Population.* The Portland, Oregon/Washington SMSA encompasses 3,653 square miles of Clackamas, Multnomah and Washington Counties, Oregon and Clark County, Washington, and includes only dry land and land temporarily or partially covered by water. The 1980 census population for the SMSA is 1,242,594.[5] Using a 100 foot minimum elevation to determine the 39 dBu contours,[6] AMCOM proposes to cover 33.75 percent of the geographic area of the Portland SMSA; CMS proposes to cover 28.55 percent; Interstate proposes to cover 43.08 percent; and MCI proposes to cover 32.57 percent. (AMCOM R. Ex. 2-C, at 6; CMS Ex. 8; Interstate Ex. 14; and MCI Ex. 34). The composite 39 dBu contours of AMCOM's proposed system cover 1,233 square miles and an estimated 1,174,559 people — 94.52 percent of the total Portland SMSA population. (AMCOM R. Ex. 1-D, at 19). CMS's proposed system covers 1,043 square miles and an estimated 1,140,008 people — 91.74 percent. (CMS Ex. 8). Interstate's 39 dBu contours cover 1,574 square miles and an estimated 1,186,608 people — 95.49 percent. (Interstate Ex. 14). Finally,

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[5] U.S. Department of Commerce, Bureau of the Census, *State and Metropolitan Area Data Book, 1982,* Table A, p. 222.

[6] *See,* 47 CFR 22.504(b), where a 100 foot minimum elevation is the standard used by the Commission since propagation charts are not given for elevations below 100 feet. It is noted that several of the applicants argued that the 100 foot minimum will not accurately depict coverage due to the mountainous terrain of the Portland SMSA. Accordingly, MCI (MCI R. Ex. 1) and AMCOM (AMCOM R. Ex. 1-D, at 18) recalculated the area and population coverages of all the applicants using, respectively, a 25 foot minimum and the so-called "Motorola Methodology". Interstate also recalculated the area and population coverages of all of the applicants based upon Compucon's alternate propagation analysis to determine the applicants' reliable service contours. (Interstate R. Ex. 3, at 10). These various analyses consistently found that Interstate covers the most area and population while CMS covers the least. Even though CMS alleges that Interstate's coverage claims are incorrect due to plotting errors, CMS does not dispute Interstate's superiority of coverage. (CMS R. Ex. 1, at 4).

MCI's proposed system[7] will cover 1,190 square miles and an estimated 1,161,051 people — 93.43 percent. (MCI Ex. 34).

9. While none of the applicants proposes to serve the entire Portland SMSA, they all propose to serve the major population, employment and traffic corridors in and around Portland.[8] Interstate's proposal encompasses the greatest area and population within the SMSA, and its 39 dBu contours include certain areas or "pockets" not covered by the other applicants. Since all of the applicants cover the densely populated downtown Portland and immediately surrounding areas, the pockets of unique coverage are at the periphery of the proposed systems where population densities are necessarily lower. Comparison of the Interstate contours with those of AMCOM discloses five pockets of unique Interstate coverage and two pockets of unique AMCOM coverage. The Interstate pockets encompass 490 square miles and include a population of 40,946 people, 835 businesses, 3,286 employees, and 2,015 high-income households. AMCOM's proposed system also fails to provide service to portions of various well-traveled highways[9], including 7 miles of I-5, 7 miles of I-30, 6 miles of Highway 26, and 5 miles of Highway 99W, with a total ADT of 36,000 vehicles. (Interstate R. Ex. 2, at 2-6).

10. CMS' proposed system excludes service to an area encompassing 539 square miles which includes 52,539 people, 1,046 businesses, 4,075 employees, 2,766 high-income households, and the towns of Ridgefield and Battle Ground, WA and Canby, OR. Portions of various highways with a total ADT of 46,000 vehicles including 18 miles of I-5, 4 miles of Highway 99E, and 4 miles of Highway 99W, are served by Interstate but not by CMS. (Interstate R. Ex. 2, at 7-10). Finally, when compared to MCI,[10]

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[7] While MCI failed to file an amended area and population supplement subsequent to its amendment of proposed cell site 1, MCI's Rebuttal case was filed after its amendment and reconfirmed the accuracy of the coverage previously stated. (MCI R. Ex. 1, Tables 1 and 2).

[8] MCI asserts that losses from terrain shadowing and narrow vertical beamwidth will significantly reduce the reliable coverage of Interstate's proposed cell 2 so that downtown Portland and significant portions of Highways I-5, I-80, and I-26 will be in shadowed regions. (MCI P.F., p. 3). However, Interstate considered terrain shadowing in engineering its proposed system. (Interstate Ex. 1, at 16 and 29). Furthermore, the failure of MCI to note the effects of signal diffraction and the overlap of Interstate's cells 3 and 5 undermine MCI's allegations.

[9] Highways with average daily traffic (ADT) volumes in excess of 10,000 vehicles.

[10] Interstate's comparison of its coverage versus the coverage of MCI was based upon a recalculation of MCI's contours to correct alleged errors in MCI's specification of site coordinates, ground elevations, and average elevations for MCI's sites 2 and 4. (MCI R. Ex. 1, at 13-15 and MCI R. Ex. 2, at 1, note 2). The recalculated MCI contours reduced the coverage of MCI's system by some 40 square miles and 7,857 people. The validity of the recalculations was not sufficiently documented and, thus, was not credited in the area and population coverage findings above. However, since MCI failed to present a detailed pocket analysis in its rebuttal case, the Interstate analysis constitutes the best record

Interstate proposes to serve 437 more square miles including 33,021 people, 555 businesses, 2,431 employees, and 1,507 high-income households. MCI's proposal excludes service to a portion of Washougal, WA and to portions of several highways, including 4 miles of I-5 and 9 miles of I-30, with a total ADT of 23,000 vehicles. (Interstate R. Ex. 2., at 10-14).

11. There are also pockets covered by AMCOM, CMS and MCI which are not served by Interstate. AMCOM's two pockets total approximately one square mile with 130 people, 2 businesses, 12 employees, 6 high-income households, and no major highways. (Interstate R. Ex. 2, at 4, Table 1). CMS's two pockets total 18 square miles including 1,929 people, 29 businesses, 82 employees, 91 high-income households, and portions of highways with an ADT of 1,000 vehicles. (Interstate R. Ex. 2, at 7, Table 2). MCI proposes to serve two pockets not covered by Interstate which cover 10 square miles, 1,203 people, 29 businesses, 82 high-income households, and portions of highways with an ADT of 1,000 vehicles. (Interstate R. Ex. 2, at 10, Table 3).

12. CMS urges that a comparison be made between the applicants on the basis of their respective "depths" of coverage; *i.e.*, the number and reach of overlapping cells in each proposed system. It is alleged that coverage depth has a number of salutary effects including: (1) enhancement of quality and reliability due to multiple paths for subscriber access from a given location; (2) greater flexibility in accommodating demand through shifting multiple cell capacity to the overlap area; and (3) enhancement of service in areas with dense concentrations of large buildings. (CMS Ex. 4, at 1; CMS R. Ex. 1, at 7-10). For their initial operating years, the areas of cell overlap, in square miles and as a percentage of system coverage proposed by the applicants, are as follows:[11]

	CMS	*%*	*MCI*	*%*	*AMCOM*	*%*	*Interstate*	*%*
No Overlap	492.8	45.5	549.8	47.0	574.2	50.2	887.3	54.3
2 Cells or more	600.2	26.3	619.5	24.7	570.5	33.1	745.7	27.1
3 Cells or more	311.6	17.6	272.8	17.1	202.7	16.7	303.3	13.6
4 Cells or more	118.4	10.8	72.6	6.2	12.0	1.1	81.2	5.0

13. *Relative Demand for Service.* All of the applicants conducted studies to determine relative demand (number of subscribers) for non-wireline cellular service in Portland over various periods of time. The forecasts for subscriber demand for cellular service are as follows:

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evidence. It should also be noted that giving full credence to MCI's calculation of its contours would still result in Interstate serving approximately 400 square miles and some 25,000 people more than MCI.

[11] CMS R. Ex. 1, at 12-13.

Year of Operation	*AMCOM*[12]	*CMS*[13]	*Interstate*[14]	*MCI*[15]
1	2,444	1,121	523	900
2	3,228	2,613	769	1,900
3	4,542	4,475	1,087	3,000
4	6,412	5,967	1,534	4,300
5	8,344	7,452	2,130	5,800
6	8,883		2,897	
7	9,440		3,861	
8	10,153		5,043	
9	10,750		6,469	
10	11,510		8,166	
11			10,162	

14. AMCOM's principal demand forecast — to assess probable business use — was developed by Arthur D. Little, Inc. (ADL). (AMCOM, Ex. 28). In addition, National Family Opinion, Inc. (NFO) conducted a telephone survey of households in Portland and five other markets in which an AMCOM-related venture is a cellular applicant which ascertained potential cellular demand among consumers (non-business users). (AMCOM Ex. 1, at 19-27). Finally, AMCOM conducted a mail survey of the paging customers of RAM Broadcasting in nine states, including Oregon. (*Id.*, at 27-29).

15. For its market research, ADL first selected certain employment categories which its past experience had shown to be prevalent users of mobile communications services of all kinds due to the tendency of such occupations to require a significant proportion of daily activity outside the principal place of business. (AMCOM Ex. 28, at 3-3 and App. E). ADL determined the total number of such "high potential interest" workers in the Portland SMSA and projected the totals for the years 1983 through 1993. (*Id.*, at 3-3, 5-14 through 5-17, and App. E). ADL's subsidiary conducted a telephone survey which attempted to contact 914 randomly selected companies in the Portland SMSA in order to interview at least 200 eligible respondents who spend a good portion of the business day away from the office. The eligible respondents were further limited to executives and managers through a screening question in the survey questionnaire that was used. *Id.*, App. C, at C-1. Of 574 total telephone contacts, 310 eligible respondents were reached and 218 interviews were completed. Thirty of the eligible respondents indicated that they were likely to subscribe to cellular service at a single monthly rate specified by the interviewer ($65, $80 or $100) "for basic service and equipment rental, plus $0.50 per local one-minute call with toll calls as an extra charge." (*Id.*,

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[12] AMCOM Ex. 28, at 3-13, Table 3-4. (Usage within CGSA).

[13] CMS Ex. 4, at 13. (Usage within CGSA).

[14] Interstate Ex. 12, at 56.

[15] MCI Ex. 29, at 3.

at C-6). The thirty affirmative responses represent 9.7 percent of the 310 total eligible respondents. (Id., at 3-5).

16. The translation of ADL's telephone survey results into an estimate of effective demand for cellular service in Portland was accomplished as follows: First, the estimated total number of "high potential interest" workers was multiplied by the 9.7 percent interest factor to determine the potential SMSA demand for such workers. Based upon its experience with new telecommunications services, ADL asserted that it takes approximately five years for surveyed levels of potential demand to be effectuated, and it formulated a penetration factor of 25 percent for year 1 rising to 100 percent by year 5. Multiplication of the "high potential interest" potential demand by the penetration factor resulted in an estimate of the effective market demand for that sector of the Portland workforce. ADL conducted no survey for the "other employment" sector of the Portland business market but assumed that, for the first year of service, a penetration of one-half of one percent of the workers in this sector represents subscriber potential. The "other employment" penetration factor used by AMCOM rises one-tenth of one percent each year until the rate reaches its maximum of 1.5 percent in 1993. (AMCOM Ex. 28, at 3-6). After combining the effective market demand estimates for the two business sectors, ADL assumed that the non-wireline operator would capture 50 percent of the total cellular subscribers in Portland to arrive at the final estimates of demand for AMCOM's proposed cellular service. (*Id.*, at 3-5 through 3-9).

17. The NFO telephone study was conducted in six markets including Portland. NFO concluded that a significant non-business demand for cellular service will arise once the total monthly cost for such service is reduced to $60 or less, a cost which AMCOM does not believe to be possible for the initial years of cellular service. At monthly total costs of $90 to $120, NFO estimates a non-business demand of 100-300 households. (AMCOM Ex. 1, at 24-26). Finally, the mail survey of RAM Broadcasting paging customers determined that the market for cellular service among pager subscribers is 9.3 percent ± 8 percent at monthly total costs of $90 to $120. (*Id.*, at 27-29).

18. ADL distributed the total effective demand to the census tract level on the basis of residential population. ADL analyzed each census tract for such factors as major highways, concentrations of businesses, shopping malls and recreational centers which attract vehicular traffic. The census tract demand estimates were then adjusted by a multiple of 1.25 for tracts with high demographic characteristics and 0.75 for tracts with low demographic characteristics. By overlaying AMCOM's 39 dBu contours, ADL determined net usage forecasts for each cell. (AMCOM Ex. 28, at 3-10 through 3-14).

19. CMS submitted six market research studies to forecast cellular demand for the Portland SMSA. CMS' market studies are based upon two premises. First, businesses will be the primary users of cellular service. Second, the current use of pagers reflects a pattern which will be applicable to the use of cellular radios. (CMS Ex. 2, at 5, 12-14; CMS Ex. 10, Sec. 2, Tables 3-7A, 3-8A, and 3-19A).

20. Claritas Corporation conducted a study to project the potential for paging services in the Portland SMSA based upon an extrapolation from pager sales records of Graphic Scanning affiliates in four or six unidentified "representative" markets. A nationwide sample of 5,541 accounts was coded by Standard Industrial Classification (SIC) code and the penetration for each two digit SIC code was calculated. The study projected 5,012 accounts and 11,656 pagers for the Portland SMSA. The study also demonstrated that among pager users there is more of a propensity to purchase communications services on the basis of industrial classification than location (CMS Ex. 10, Sec. 1). However, the Claritas study fails to address the question of the relevance of demand for paging service to the potential demand for cellular service. (MCI R. Ex. 3, at 57-58; Interstate R. Ex. 6, at 16-17).

21. Westat, Inc. conducted a telephone survey in the top 30 cellular markets in which Graphic Scanning and its cellular affiliates are applicants. Seventy-eight interviews were completed in Portland out of a total of 2,171 completed interviews. Data from all the interviews were combined and a composite estimate of Portland demand was derived by weighting the Portland interviews at 0.3 to determine how the overall survey results would affect Portland. (CMS Ex. 11, at 3-1, 3-4). The Westat study estimates a need for 27,200 cellular units (15,100 mobile and 12,100 portable units) during the first five years of service in Portland at a charge of $110 per month by establishments reporting very likely or probable use of cellular service. (*Id.*, Table 3-1a). Westat states that the results of its survey "must be interpretated as indications of interest rather than as predictions of use." (*Id.*, at 3-2).

22. Graphic Scanning conducted two telephone and two mail surveys. One telephone survey was performed on the general population of businesses in Portland and the other was performed on Graphic Scanning pager customers in the combined SMSA's where Graphic Scanning operates. Graphic Scanning conducts no paging operations in Portland. The results of these telephone surveys appear in two sets of tables, adjusted and non-adjusted for non-responses. (CMS Ex. 10, Secs. 2 and 3). One mail survey was performed on the general business population of Portland falling within the fifteen most pager-penetrated SIC codes and the other was performed on Graphic Scanning pager customers. The

findings of the two surveys are summarized. (CMS Ex. 10, Sec. 3, at 7 and Sec. 4, at 5).

23. The testimony of CMS witness Roger Paradis indicates that, based upon the various studies conducted, Graphic Scanning was able to categorize the major SMSA's according to the relative need for personal communications services, and to measure the projection of absolute need required within each CGSA. (CMS Ex. 2, at 14). Citing Figure II-7 which displays the distribution of cellular service need on a per one thousand population basis by SMSA, witness Paradis asserts that Portland, along with 13 other SMSA's, has a projected need of .0060 cellular units per 1,000 population (total market need of 7,452 units for year 5 based upon the 1980 census population for the Portland SMSA). Figure II-7, however, has no basis in the record and, in fact, is inconsistent with the record.[16] CMS' demand figures for the first five years of operation appear in its Exhibit 4, at page 14. However, no explanation is given as to how CMS derived the demand figures for the first four years. (Interstate R. Ex. 6, at 19-20; AMCOM R. Ex. II-D, at 17-18).

24. CMS' distribution of total demand to the individual cell level also appears in its Exhibit 4, at page 14. The sponsor of Exhibit 4, J. Douglas Wells, does not indicate how the distribution was performed. Witness Paradis testified that Graphic Scanning plotted maps showing household densities, traffic patterns, concentrations of places of employment and pedestrian gatherings, and densities of households with $50,000 annual income to project models of cellular system usage. (CMS Ex. 2, at 5). However, since no details of how such models were utilized was provided, such assertions are meaningless and would appear to be contradicted by CMS' estimates of identical numbers of subscribers to its cells 1, 2 and 3 for all five years of operation. (STS P.F., para. 14).

25. Interstate's two market research studies were conducted by Compucon, Inc. and the Gilmore Research Group. (Interstate Exs. 12 and 13). The purposes of the Compucon study were to develop a cellular user profile, to forecast the expected number of cellular units in service in Portland over a ten year period, and to distribute the demand throughout the service area. (Interstate Ex. 12, at 53). Compucon selected occupations identified as being the most likely to contain cellular users — "high potential users". The percent of each industry's employment classified as high potential users was then applied to projected Portland employment figures to derive the total number of potential Portland users. (*Id.*, at 102).

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[16] For example, Figure II-7 is based upon cellular demand per 1000 population. Figure II-6 indicates that "cellular units per population" is derived from the Claritas study. However, the Claritas study estimated "accounts per hundred businesses and pagers per thousand employees" for each SIC Major Industrial Group Code. (CMS Ex. 10, at 4). Nowhere does the Claritas study estimate any demand by population figures.

Compucon next determined the national penetration ratio for existing mobile telephone service which was utilized to compute the first-year market penetration. (*Id.*, at 103). Based upon twelve years of pager sales data, Compucon computed the national penetration ratio for pagers and applied the ratio to the total Portland user estimates to project the growth of effective cellular demand following the first year. All of the effective demand estimates were further adjusted to reflect the fact that personal income growth in Portland exceeded the national average. (*Id.*, at 103-104). The final estimates of effective demand for Portland were calculated under "pessimistic", "expected" and "optimistic" scenarios which involved differing assumptions of penetration rates and market shares. Compucon's "expected" estimates assume that Interstate will experience a one-third market share in year one and increase its market share to one-half by the eleventh year. (*Id.*, at 56, and App. J. at 167-171).

26. To verify Compucon's estimates, Gilmore was commissioned to conduct a public demand survey of potential business customers of cellular service in Portland. Gilmore screened 745 businesses and professionals in Portland and conducted 192 personal interviews with people expressing an interest in cellular service. (Interstate Ex. 13, at 9). Using an intent translation of .5 for "very likely" cellular use responses and .1 for "somewhat likely" responses, both at a stated cost of $120 per month, and a 50 percent market share assumption, Gilmore calculated the initial effective cellular demand for Portland to be 543 units in the first year. (*Id.*, at 6, 22-23). Using the Bass diffusion model equation, Gilmore forecasted the effective demand for years 2-10. (*Id.*, at 12-13 and App. B).

27. Compucon, based upon information considered to be key indicators of cellular demand, developed high potential area profiles for the Portland SMSA. (Interstate Ex. 12, at 58-59). Compucon's "expected" effective demand estimates were distributed to micro-levels of geography, generally census tracts, based upon a Market Potential Index reflecting the key demographic factors of population, number of businesses, number of employees, number of high-income households, and major traffic arteries. (*Id.*, at 22-31 and 60).

28. To estimate demand, MCI commissioned a public need survey, a selected industry survey, and focus groups sessions. (MCI Ex. 28, at 3-4). The public need survey was designed by SRI International, Inc. and conducted by Chilton Research Services. The survey was designed to reach a representative sample of potential subscribers and to determine the general interest in cellular service, the expressed intent to subscribe at various price levels, likely usage patterns, desired service enhancements, and a profile of likely subscribers. (*Id.*, App. 3 at 1-3). MCI completed a total of 807 telephone interviews with respondents in the Portland SMSA from households having incomes of at least $20,000

before taxes. The sample group was selected by random digit dialing, and a response rate of 66% was obtained. (*Id.*, App. 3, at section III, p. 3 and section VI, App. A, p. 7). Eligible respondents were given a description of cellular service and were asked to state the relative likelihood that "you or your firm would subscribe to the service for your use" at three monthly cost levels for cellular service and equipment. (*Id.*, at 6-7 and at App. 3, App. A and A-54 — A-56). MCI assumed that the mid-level of $125 per month would be the cost typically incurred by a cellular user, and the telephone survey had estimated gross potential demand at that cost level as 63,000 subscribers in year one. MCI then applied an Intent Translation Scale (60 percent of "definitely subscribe" respondents, 30 percent of "probably subscribe" respondents, and 5 percent of "probably not subscribe" respondents) to estimate the realizable demand at 17,400 subscribers in year one. (*Id.*, at 12-14). MCI next analyzed various factors such as elasticity of demand, changes in price of service and equipment over time, the introduction of new features and service capabilities, the impact of distributors, dealers and resellers, changes in customer usage patterns and preferences, evolving traffic patterns, pent-up and latent demand, and population and industrial development. Based upon its analysis, MCI estimated its number of cellular subscribers as follows: Year 1 — 900; Year 2 — 1,900; Year 3 — 3,000; Year 4 — 4,300; and Year 5 — 5,800. (MCI Ex. 29, at 2-3).

29. The selected industry survey and focus group sessions were conducted to gain qualitative insight into the attitudes and needs of both business and other potential cellular subscribers. (MCI Ex. 28, App. 3, at App. B, 3-4 and App. 2, at 2). The selected industry survey, conducted by SRI, consisted of 100 telephone interviews of companies chosen from 5 industry sectors expected to have a need for cellular service. The survey elicited information regarding the level of interest in cellular service, sensitivity to price, likely usage patterns, and characteristics of likely user companies. (*Id.*, App. 3, at App. B, 3-4). The focus group sessions were conducted by Lieber Attitude Research, Inc. in Los Angeles and Dallas. The focus groups investigated interest in cellular service, attitudes toward and preferences for service by wireline and non-wireline companies, additional features or services which might be desired, preferences as to car or portable units and particular equipment suppliers, and preferences for purchasing or renting equipment. (*Id.*, App. 2, at 2-3).

30. *Ability to Accommodate Anticipated Demand.* AMCOM has engineered its initial system with six cells and sufficient channel capacity (120 channels) to service 2,444 subscribers.[17] (AMCOM Ex. 25, at Table 1

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[17] The ADL demand forecasts for the Portland SMSA were all reduced in some unexplained manner in AMCOM's estimates of the number of subscribers within AMCOM's CGSA. Compare AMCOM Ex. 25, Table 1 with AMCOM Ex. 28, Table 3-4.

and Ex. 29, at 1). AMCOM's demand estimates are based upon its demographic analysis and market surveys. AMCOM's proposed CGSA was drawn to encompass all areas which do now or are expected in the future to exhibit significant levels of demand for cellular service in the Portland SMSA. AMCOM's channel assignments are based upon its ten-year subscriber and channel forecasts. (AMCOM Ex. 25, at 32 and Tables 1 and 2). AMCOM is capable of expanding channel capacity rapidly in the first year of operation to meet unanticipated demand exceeding the initial designed system capacity. (AMCOM Ex. 1, at 30 and Ex. 23, at 11-15).

31. AMCOM proposes to construct six cell sites in its first year of operation, all of which will operate in an omnidirectional mode.[18] (AMCOM Ex. 25, at 36). Frequency reuse is not expected to become necessary until the fifth year of operations. (*Id.* at 35). AMCOM's frequency plan assigns channels to meet a system grade of service (GOS) objective of 0.02 Erlang B.[19] The total traffic for the system was determined on the assumption of a peak channel load of 0.03 Erlangs per subscriber. (*Id.*, at 32). The assignments of specific channels are made from 21 channel groups which will facilitate system expansion and later reuse. (*Id.*, at 33). While no co-channel interference is present in AMCOM's initial system, there are a number of adjacent voice channel assignments. (Interstate R. Ex. 12, at 19 and MCI R. Ex. 11, at 93-110).

32. AMCOM proposes to use equipment manufactured by Motorola, including base station RF equipment and the EMX-500 central switch. (AMCOM Ex. 7, at 3 and Ex. 29, at 2). The switch will be in a secure location, will be internally redundant, and will have available both battery and generator backup power. (AMCOM Ex. 29, at 2). The central switch records traffic statistics on a cell-by-cell basis. When the measured grade of service at any cell approaches 0.05, additional channels will be added at the site on a "plug-in" basis to restore the design grade of service.

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[18] Omnidirectional cells generally employ a single transmission antenna and have all channels available to all subscribers in the service area.

[19] Grade of service is a measure of the probability that, during a specified period of peak traffic (that hour within a 24-hour period in which the most calls are placed and/or received), a call offered to a group of trunks or circuits will fail to find an idle circuit at the first attempt (*i.e.*, the ratio of the number of uncompleted calls to the number of calls attempted in a specific one-hour period). A .02 GOS, for example, means that during the busiest hour of the day, an individual has a 98% probability that his call will be either received or transmitted on the first try. In designing a cellular system, the designer uses grade of service objectives as well as "peak" or busy hour traffic to determine channel requirements. Other factors involved include adoption of assumptions concerning user habits including the number of calls made per hour and average call length. These assumptions have been reduced to mathematical formulas and resulting "Erlang" tables. The formula on which the Erlang B traffic tables are based reflects the assumption that the subscriber, finding all channels busy, will immediately hang up and disappear from the system for some specified time period.

(AMCOM Ex. 25, at 32-33 and Ex. 29, at 7).[20]

33. CMS proposes an initial 8 cell omni-directional system with 81 assigned channels. The eight cells are sufficient to satisfy projected demand through year 5, but CMS will initially install only such equipment as is necessary to satisfy projected first year demand. (CMS Ex. 4, at 2, 7 and Ex. 9, at 4). The system design provides for multiple cell overlap concentrated in downtown Portland. (CMS R. Ex. 1, App. 1). CMS' system was designed to serve downtown Portland, all expressways and main traffic arteries, and mass transportation. (CMS Ex. 4, at 1).

34. CMS will install a Motorola EMX-500 central switch configured for 768 ports (a "250" configuration). (CMS Ex. 4, at 5). CMS proposes Motorola base site controllers and RF equipment for cells 1 through 7 and a Graphic base site controller and E.F. Johnson RF equipment for cell 8. All cell sites will have auxilliary power sources, and CMS' proposed equipment is capable of redundant operation for key functions. (*Id.*, at 6).

35. For the first year of operation, CMS proposes the assignment of 73 voice channels and 8 signalling channels. (CMS Ex. 9, Table 4). CMS' initial system is designed to provide a 0.01 grade of service using the Erlang B formula and the assumption that each subscriber will generate 0.026 Erlangs of traffic. (CMS Ex. 9, Table 4 and Ex. 3, at 17). CMS, however, has made its channel assignments for years four and five based upon a 0.05 grade of service. (CMS Ex. 4, at 12, 14-15). CMS will monitor its system traffic continuously for the purpose of maintaining the design GOS of 0.01. (*Id.*, at 13). CMS will add capacity when any cell experiences a 0.05 GOS for 21 of the preceeding 30 days. (*Id.*, at 2). CMS' initial channel assignments are sufficient to accommodate the 1,121 subscribers forecast for year one. (CMS Ex. 4, at 13 and MCI R. Ex. 4, Table 2). Allegations are made that CMS' initial system will suffer adjacent signalling and voice channel interference problems. (MCI R. Ex. 4, Atts. F-1, F-3, F-4 and STS P.F., para. 25).

36. Interstate proposes an initial six-cell, omnidirectional system. (Interstate Ex. 1, at 108). Interstate has placed its cells based upon its market research, and its proposed CGSA covers all areas where great demand for cellular service is anticipated. (*Id.*, at 123). Interstate proposes to use a Motorola EMX-250 switch as well as Motorola base site transmitters and controllers. (Interstate Ex. 11, at 5).

37. Interstate's initial system has sufficient channel capacity (39 channels) to accommodate the 523 first-year subscribers that it projected. (Interstate Ex. 1, at 99, 109). Its channel plan is based upon the ten-year demand forecast and the assignment of specific channels from 24 channel groups each containing 13 channels. (*Id.*, at 105, 108-116). Frequency

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[20] There is some confusion as to whether AMCOM's take-action level of 0.05 applies to a system-wide or cell-by-cell service deterioration. *Compare*, AMCOM Ex. 10, at 2.

reuse is not anticipated in the initial system. (*Id.*) Interstate's design GOS is 0.02 based upon the Erlang B traffic formula and an assumption of 0.0167 Erlangs per subscriber. User statistics by cell will be closely monitored, and capacity will be added if the cell with the heaviest traffic loading consistently approaches a 0.05 GOS. (*Id.*, at 95). No creditable allegations have been made that Interstate's initial system will suffer from co-channel or adjacent channel interference problems.[21]

38. MCI's initial system will consist of one sectored[22] downtown cell surrounded by five additional omnidirectional cells. The six cells will be equipped with 123 voice channels which will be sufficient to handle 1,790 subscribers, most of the demand MCI projected through the second year of operations (1,900 subscribers). (MCI Ex. 5, at 1, 7-8; MCI R. Ex. 4, Table 4). There are allegations that MCI's initial system will suffer interference from adjacent voice channel assignments. (Interstate R. Ex. 12, at 16-17 and CMS R. Ex. 3, at 16-17). The channel assignments are designed to provide a 0.02 GOS based upon the Erlang B traffic formula and an assumption of a 0.04 Erlang holding time. Traffic will be monitored continuously to ensure that the design GOS is maintained. (MCI App. Ex. 5, at 1; Ex. 21 at 18; Ex. 35, at 18). MCI will use the L.M. Erricsson AXE-10 central switch supplemented by a mobile Telephone Subsystem. (MCI Ex. 17, at 1,3). Modular base station transmitting and receiving equipment manufactured by SRA Communications will also be used. (MCI Ex. 18, at 1).

39. MCI proposes to serve all areas of the Portland SMSA where it has anticipated a great need for service. (MCI app. Ex. 2). MCI's subscriber projections are based upon demographic analyses and market surveys, and were used in conjunction with its cell plan to derive a frequency plan. (MCI App. Ex. 5, at 1). To determine traffic loading at each cell, MCI overlaid its cell plan on census maps indicating the relative distribution of demand among the cells. The estimated number of subscribers was then distributed among the cells in proportion to the population distribution among the cells. The calculated channel requirements were then adjusted to reflect other demographic factors such as household income, vehicles on major arteries, and major locations of employment (*Id.*, at 7).

40. *Service to Roamers.* AMCOM proposes a registration fee for roamers, but the amount has yet to be determined. (AMCOM Ex. 3, at 9). Following manual registration with AMCOM, roamers will have automat-

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[21] STS' allegation that Interstate assigned adjacent signalling channels for its cells 2 and 3 is rejected. The record discloses that no adjacent signalling channels have been assigned. (Interstate Ex. 1, at 152 and 163).

[22] Cells which are sectorized employ multiple directional antennas each serving a particular portion of the cell. Channels allocated to the cell are divided among the sectors. Thus, subscribers in a sectorized cell have available for their use the channels that are assigned to the sector they are in.

ic access to the system without operator intervention and will be subject to the same air-time charges as local subscribers. Portland roamers using other AMCOM cellular systems will be able to have their calls forwarded from the Portland system. (AMCOM Ex. 29, at 3). CMS proposes fully automatic roamer registration. (CMS Ex. 6, at 7). Roamers in CMS' system would be assigned the same local number assigned in the roamer's home system. Accordingly, the roamer can be directly reached through tone pad dialing of an access number followed by the roamer's home system number. (CMS Ex. 3, at 10-11; Ex. 6, at 4). Roamers will be subject to the same air-time charges as local subscribers. (CMS Ex. 6, at 24).

41. Registration in Interstate's system will be controlled by the system operator who will assign a temporary directory number to the roamer. (Interstate Ex. 1, at 64). Interstate proposes higher air-time charges for roamers. (Interstate Ex. 5, at 13). Interstate will provide its subscribers with a toll free number to contact if they encounter difficulty in securing roamer services elsewhere and will guarantee payments of its subscriber roamer charges to another carrier. (Interstate Ex. 11, at 19). MCI's system is capable of providing a number of roamer registration options ranging from fully automatic to wholly manual. (MCI Ex. 17, at 11-15). Operator assisted roamer calling will be available in the first year of operation regardless of the status of intersystem registration. (MCI Ex. 35, at 5, 12).

III. Issue (b)

42. *Expansion Plans.* AMCOM's general plan of expansion is as follows: First, channels will be added according to the frequency plan until all channels assigned to the cell frequency group have been exhausted. The addition of channels can easily and quickly be accomplished with modular equipment. (AMCOM Ex. 25, at 15). Second, the addition of new omnidirectional cells. Third, conversion to sector transmit when highly active cells have used all available channel group frequencies. AMCOM's cells are equipped with the antennas necessary to implement sector transmit operation for six, 60-degree sectors. (AMCOM Ex. 10, at 23). Finally, cells will be subdivided on a sector transmit basis when the capability of expansion through sector transmit has been exhausted. Grade of service may be maintained while the additional cell sites are constructed by borrowing channels for use at heavily loaded cells. (*Id.*, at 23-24). AMCOM's initial six cell, 120 channel system is sufficient to accommodate the demand projected for that year. (AMCOM Ex. 25, Table 1). All six initial cells will operate in an omnidirectional mode and there will be no need for channel reuse. When a GOS of 0.05 is approached, AMCOM will expand system capacity by adding channels according to its channel assignment table. (*Id.*, Tables 3, 4, and 5). In year

four, a seventh omnidirectional[23] cell will be added.[24] In year 5, when frequency reuse becomes necessary, six new cells will be constructed (cells 8, 10, 11 and 13 will be sectored and cells 9 and 12 will be omnidirectional) and existing cells 3 and 7 will be converted to sector transmit. (*Id.*, at 35). In year nine, cells 14 through 17 will be constructed for sector transmit, at which time only original cells 1, 4, 5 and 6 will remain omnidirectional. (*Id.*, at 35-36).

43. AMCOM chose its channel groups based upon the assumption that subscriber density will eventually grow to the point that all omnidirectional cells will have to be subdivided and a four-cell sector reuse pattern implemented. (AMCOM Ex. 25, at 33). AMCOM's frequency plans fail to assign frequencies to specific sectors of sectorized cells so a detailed interference analysis is not possible. AMCOM's frequency plans do indicate that channel retuning will be required in years 5 and 9, and that the number of channels in several cells will decrease over time due to the addition of cells. (*Id.*, at Table 2 and Tables 4 through 7). Finally, the relative size and placement of AMCOM's cells when compared to the ideal expansion grid appear to be explained by propagation anomalies rather than any inherent defect in cell layout. (AMCOM Ex. 25, at 35-36; STS P.F., para. 38).

44. CMS' proposed 8 cell system is configured physically at the level for the fifth year of its demand forecast. CMS will initially install only such equipment and assign only such channels as are necessary to meet first year demand. (CMS Ex. 4, at 2-4). CMS has developed a five-year frequency plan. (CMS Ex. 9, Table 4). All eight of CMS' cells will be omnidirectional for years 1 through 4. (CMS Ex. 9, at 22). During this period, system capacity will be expanded by adding channels at the cell sites. (CMS Ex. 3, at 9; Ex. 4, at 9). In year 5, frequency reuse (four cell reuse pattern) commences, and cells 1 through 7 will be converted to sector operation. (CMS Ex. 9, at 7 and 22). For year 5, CMS proposes a total of 373 channels which will serve 7,452 subscribers. (CMS Ex. 4, at 13). CMS proposes an initial GOS of 0.01. (CMS Ex. 3, at 16). However, for the fourth and fifth years CMS has calculated its channel requirements based upon a 0.05 grade of service. (CMS Ex. 4, at 12-15). CMS will monitor system traffic, and when GOS equals or exceeds 0.05 for 21 of the preceeding 30 days, the system will be analyzed to determine what action is necessary to improve the GOS. (CMS Ex. 3, at 16; Ex. 4, at 2).

45. As noted above, CMS touts the alleged benefits of its so-called "depth of coverage", *i.e.* multiple cell overlap. Indeed, the close spacing of

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[23] Sector operation is not necessary because no cell is highly active and all 333 channels are not yet used. (AMCOM Ex. 29, at 8).

[24] The cell site transmitter is located at the position necessary for the subsequently planned sectored operation of cell seven. (AMCOM Ex. 25, at Figures 3 and 4).

CMS' cells creates substantial overlap with 311.6 square miles of three cell overlap and 118.4 square miles of four cell overlap. (CMS R. Ex. 1, at 12-13). However, the close cell spacing proposed by CMS to maximize its depth of coverage violates the frequency reuse principles stated by CMS and will create undue interference in CMS' proposed system. CMS states that for a nominal cell radius of 11 miles, typical separation for frequency reuse is about 48 miles between cell centers of omni transmit is involved on both ends and 38 miles between cell centers if both cells are using sector transmit. (CMS Ex. 3, at 20). However, by the fifth year of operations several cells which have been assigned the same frequencies will fall short of these standards. CMS proposes to reuse channels at sectored cells 1 and 5, 2 and 6, and 3 and 7 which are, respectively 21.1, 16.6, and 17.6 miles apart. In addition, sectored cell 4 and omni cell 8 are only 17.6 miles apart and are assigned some of the same frequencies. (CMS Ex. 9, Table 4 and AMCOM R. Ex. 2-C, at 16). By CMS' own standards, its fifth year system will suffer significant co-channel interference problems.[25]

46. Interstate's initial system consists of six, omnidirectional cells. (Interstate Ex. 1, at 108). The initial system was deemed usable through year nine, with subscriber capacity being increased through these years by the addition of channels at the original site locations. (*Id.*, at 108-109). Interstate has developed a frequency plan for the years 1985 - 1995 based

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[25] The other applicants performed interference analyses of CMS' proposed system based upon various D/R ratios (Distance between cells/Radius of cells) and a 17 dBu C/I (Carrier/Interference) contour. (AMCOM R. Ex. 2-C, at 13-16; Interstate R. Ex. 12, at 6-9; MCI R. Ex. 11, at 69-71). STS asserts that the applicable standard for determining harmful co-channel interference is a 26 dBu C/I. However, it is noted that pursuant to Section 22.903(c) of the Commission's Rules, applicants must comply with Section 22.504 of the Rules and F.C.C. Report No. R-6406 "Technical Factors Affecting the Assignment of Facilities in the Domestic Public Land Mobile Radio Service" by Roger B. Carey (Carey Report). The Carey Report adopts neither D/R nor C/I ratios, but establishes as the point of comparison the proposed 39 dBu contours. The procedure set forth by the Carey Report for evaluation of co-channel interference between two stations considers the terrain and time variations of the desired and interfering fields and the minimum acceptance ratio of desired to undesired signals, and applies them to a formula which determines the required ratio between the desired and undesired fields. None of the parties has presented sufficient and persuasive evidence to compel acceptance of an alternative comparative technical standard not adopted by the Commission and potentially in conflict with expressly adopted standards. In view of the controversy surrounding this technical issue and, in the absence of an express engineering standard on the subject enunciated by the Commission, neither C/I nor D/R formulas can be said to be definitive. However, the findings here made are based on the fundamental principle that the spacing between cells should follow as uniform a pattern as possible to achieve optimal coverage with minimal intra-system co-channel interference. This principle has been recognized by most of the applicants in the instant proceeding. (CMS Ex. 3, at 18; MCI Ex. 21, at 4-5; and Interstate Ex. 1, at 135).

upon its market studies and its distribution of demand to the cell level. (*Id.*, at 108). The frequency plan was evaluated in light of the eventual need to expand the system through omni transmit/reuse, sector transmit, and eventual cell splitting. (*Id.*, at 12). The total number of channels assigned during the first nine years of operation increases from 39 to 184, and adjacent channels are not assigned to adjacent cells. (*Id.*, at 109-111). Interstate's GOS will not be allowed to degrade beyond 0.05 (*Id.*, at 120).

47. In year ten, Interstate anticipates that the voice channel requirements will exceed the omni frequency plan expansion capability and proposes to sectorize cells 2 and 3 into six sectors following a four cell reuse pattern. (Interstate Ex. 1, at 108). In year eleven, Interstate anticipates that cell splitting will be required and proposes the addition of a split sectored cell positioned between cells 2 and 3. (*Id.*, at 114). The four cell reuse pattern will be divided by three to reflect a twelve cell reuse pattern which retains the original cell sites and adds needed voice channels. (*Id.*, at 114-115). Extensive retuning of Interstate's system will be required in year ten. (CMS R. Ex. 3, at 30-32; Interstate Ex. 1, at 111 and 113).

48. The selection of Interstate's cell sites does vary somewhat from points on the idealized expansion grid due to irregularities of terrain and land availability and use constraints. The site selections do, however, appear to be located closely to points on the expansion grid, and Interstate evaluated its site locations through an additional RF propagation study. (Interstate Ex. 1, at 124).

49. MCI proposes an initial six cell system with the central downtown cell sectored (3 sectors) and the five peripheral cells operating in an omnidirectional mode. (MCI App. Ex. 5, Table 5.3-1). The channels allocated to the initial six cells will be sufficient to accommodate most of the demand forecasted through the second year of operation to provide a margin for growth. (*Id.*, at 5-7). MCI has presented a channel plan which will be applicable through year two. (*Id.*, at 5-8). When expansion is needed, MCI will expand its system by the following methods: (1) add channels within the baseline allocation; (2) borrow channels; (3) add sites; (4) convert to sector antennas; and (5) cell splitting. Step 3 is an alternative prior to steps four and five and need not be undertaken prior to sectorization. (MCI Ex. 21, at 18-23). MCI will continuously monitor traffic and is committed to maintaining its design GOS of 0.02 through incremental increases in capacity. (MCI App. Ex. 5, at 5-1). However, MCI has not presented any detailed "take-action" criteria for the addition of system capacity. (MCI Exs. 21 and 25; MCI App. Ex. 6). In year three, MCI will add channel capacity and new cell sites in the downtown Portland area. (MCI App. Ex. 5, at 5-7).

50. MCI has structured its proposed system according to a seven cell reuse pattern. (MCI App. Ex. 5, at 5-1). MCI's proposed cell shapes and sizes appear to be located close to points on the expansion grid. (*Id.*, at 5-5). Finally, MCI's frequency plan involves no co-channel interference problems and adjacent channels are not used either at the same sites or at adjacent sites in hand-off situations. (MCI R. Ex. 4, at 21).

IV. Issue (c)

51. *Rates, Charges, Practices and Classifications.* The applicants propose to offer basic cellular service at the following monthly rates:

	AMCOM[26]	*CMS*[27]	*INTERSTATE*[28]	*MCI*[29]
Monthly Access charge	$16.00	$4.95	$25.00	$15.00
Usage Per Minute				
Day	.30	.31	.40	.25
Evening	.15	.21	.20	.15
Night	.15	.12	.20	.15

52. AMCOM will bill air time usage in one minute increments, but will not bill for recorded air time lasting less than 20 seconds. (AMCOM Ex. 3, at 5). This will enable customers to recognize, without charge, nonresponses (incompleted calls) but in a time period sufficiently brief to prevent substantial waste of system capacity. (AMCOM R. Ex. 4-F, at 3). AMCOM also proposes to offer bulk service at discount rates. For 50-100 units, the monthly access charge is $13.60, and for over 100 units the charge drops further to $10.66. In addition, there is a 10 percent discount on off-peak (Evening and Night) air time charges for subscribers with more than 100 units. (AMCOM Ex. 3, at 6). There will be a $10.00 connection charge for each station number reserved for a cellular unit. (*Id.*, at 5). AMCOM subscribers will be able to obtain additional phone numbers in different toll exchanges in order to avoid intra-CGSA toll charges. (*Id.*, at 8).

53. AMCOM will offer a variety of enhanced features such as intercity least cost routing, call waiting, call forwarding, three-way (conference) calling, and automatic answering service, each at additional charges. (AMCOM Ex. 3, at 7-8). AMCOM will offer service to roamers, but the registration charge for such service has yet to be developed. AMCOM has failed to adequately prove its assertion that its rate proposals are cost based. (*Id.*, at 1-4).

54. CMS' air time charges apply only after the parties have been connected (CMS R. Ex. 5, at 5, note 7), and will be billed in first 30 second

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[26] AMCOM Ex. 3, at 5-6.

[27] CMS Ex. 6, at 24-24a.

[28] Interstate Ex. 5, at 13-14.

[29] MCI Ex. 13, at 8-10.

and subsequent 6 second intervals. (CMS Ex. 6, at 24, 24a). CMS' basic service includes clear voice, information services, unlimited emergency calls, least cost routing, and operator assistance. Optional services offered at additional cost include call forwarding, delayed (no-answer) forwarding, call waiting, conference calling, secured voice, and store and forward voice. (*Id.*) Distant roamers will pay $3.00 per month plus an air time usage surcharge of $.35 per minute. Local roamers will be subject to the applicable local subscriber charges. (*Id.*) CMS also proposes to offer data services to utilize idle system capacity. (*Id.*, at 18). Finally, CMS fails to provide for bulk service discounts, but states that it will promote resale of its service. (CMS Ex. 6, at 26).

55. Interstate's monthly access charge includes 60 minutes of air time usage as well as message waiting, message storage and retrieval, call waiting, speed calling, and last number recall. (Interstate Ex. 5, at 13-15). Interstate's usage charges, which are billed in one minute increments, begin only when the connection of a call has been completed. (*Id.*, at 9). In addition to the basic services offered, Interstate will also provide operator backup, call forwarding, and conference calling options at an additional charge. (*Id.*, at 14-15). Bulk service will be offered at various discounts from the monthly charge as follows: 10-24 units — 10 percent; 25-49 units — 20 percent; 50-99 units — 35 percent; and 100 plus units — 50 percent. Roamers will pay a $1.00 per day access charge (includes no air time allowance) plus $.50 per minute for peak period usage and $.25 per minute for off-peak usage. (Id., at 13).

56. MCI will bill for air time usage in one minute increments. (MCI Ex. 13, at 13-9). In addition to its basic service which includes direct access to intercity systems at no additional charge, MCI proposes the following additional cost services: call waiting, call forwarding, no-answer transfer, conference calling, operator message assistance, and voice mailbox. (*Id.*, at 13-10). MCI also states that it will not pass through intra-CGSA toll charges to its customers. (MCI Ex. 13, at 8; MCI R. Ex. 12, at 20-26). MCI does not propose any specific bulk service discount. MCI will offer service to roamers at an access charge of $5.00 per day (maximum of $20 per billing period), subject to the same usage charges as regular subscribers. (MCI Ex. 13, at 13-9).

57. *Maintenance and Personnel.* RAM Cellular, an AMCOM joint venturer, will have overall managerial control of AMCOM's Portland cellular system. (AMCOM Ex. 26, at 38). In addition, RAM of Oregon, an affiliate company providing mobile telephone and paging operations in Portland, will also provide needed service to AMCOM. (*Id.*, at 39-40). AMCOM will employ an operations manager, a bookkeeper, a collections manager, a customer service manager, secretary/receptionist, and an unspecified number of telephone operators. (*Id.*, at 48 and 51-54). AMCOM

will also employ a technical coordinator and his staff. (*Id.*, at 40-41). The sales efforts of AMCOM's three in-house sales people will be supplemented by the telemarketing efforts of Western Union, an AMCOM participant (*Id.*, 49-51). Certain financial and customer service functions will be performed under contract by Western Union (*Id.*, at 40, 43-46, 49-51 and 53) and by RAM Cellular (*Id.*, at 52).

58. AMCOM's central switch will be located in an existing Western Union facility in Portland. Western Union technical employees will maintain and operate both the cellular switch and AMCOM's base stations. (AMCOM Ex. 26, Att. A). Western Union technicians hold general class radiotelephone permits and typically 12 years of experience in the maintenance and repair of transmission and switching equipment. (*Id.*, at 44). In addition, AMCOM will hire two employees to oversee the maintenance of the system. (*Id.*, at 40-41). The system will include testing and diagnostic routines, and every cell will be tested and physically inspected at least weekly. (*Id.*, at 47). The switch and all cells will have uninterruptible power equipment and backup batteries and generators. (*Id.*, at 42). The equipment used will have built-in alarm systems, and two test mobiles will be used to verify system performance. (*Id.*, at 42-43).

59. CMS will have access to the resources and personnel of its corporate parent and Graphic Scanning which will provide technical, marketing and management support. CMS' Vice-President, Technical Services, Mr. J. Douglas Wells, will be responsible for system planning, implementation and expansion. (CMS Ex. 7, at 2 and App. A). CMS' President is the General Manager responsible for overall operation. (*Id.*) CMS proposed a first year Portland staff of 54 persons (30 independent contractor resellers) allocated to marketing, technical and administrative positions, including one R/F Digital technician, six EMX technicians, five sales personnel, and four administrative personnel. (CMS Ex. 9, at 12). CMS' local employees will perform all aspects of its Portland cellular operations. (CMS Ex. 7, at 4). All technical personnel will receive training both before and after system implementation. (*Id.*, at 25-27).

60. CMS' central switch will be located in a secure area with full auxiliary power to prevent loss of service. (CMS Ex. 4, at 6). The central switch will be manned 24 hours per day and a daily system status evaluation will be performed through diagnostic routines. (CMS Ex. 7, at 5). Cell site equipment will be similarly tested daily and will be further monitored by an alarm system which immediately relays failures to the mobile exchange. (*Id.*). All cell site alarms which result in a GOS deterioration will be serviced immediately, while all others will be serviced within 2 hours. (*Id.*). CMS will also provide a DUET control system which will utilize the switched telephone network to test and, when necessary, to operate remotely located equipment normally operated over designated

facilities. (CMS Ex. 6, at 20). All cells sites will have backup power sources. (CMS Ex. 4, at 6-7).

61. Interstate proposes to employ a general manager, an operations manager, an installation service manager, an installer, a chief technician, a technician, an executive secretary, an accountant, a bookkeeper, a field service representative, a customer service representative, and four sales representatives. (Interstate Ex. 10, at 12). Interstate will also rely upon the technical expertise and resources of its partners, all of whom are licensed radio common carriers with facilities in the Pacific Northwest. (Interstate Ex. 9, at 2).

62. Interstate's installed system will be subjected to installation and acceptance testing by Motorola, Inc. and by Compucon, Inc. prior to commencing operations. (Interstate Ex. 9, at 3-4). The system will have backup power facilities and will incorporate extensive self-diagnostic routines. (*Id.*, at 5). In addition to complying with all manufacturer's recommendations respecting equipment testing and maintenance, Interstate will perform further preventive maintenance procedures on a monthly basis. (*Id.*, at 5-6 and Att. 4). Interstate's two technical employees will be located at Mobile Radio Communications Service, Inc.'s Portland maintenance facility and will be on-call at all times. (*Id.*, at 2 and 7). Interstate will also utilize back-up maintenance from the technical staffs of its partners. (*Id.*, at 7).

63. MCI will manage its cellular system and provide integrated maintenance and repairs from a Cellular Network Management Center (CNMC). The CNMC will be co-located with MCI's Mobile Telecommunications Switching Office (MTSO). (MCI Ex. 17, at 11). The CNMC will be staffed 24 hours per day with a manager and operations personnel. An MTSO Maintenance Specialist and a Base Station Maintenance Specialist will be employed for each shift, and a CNMC Supervisor and a Network Analyst will work the two busiest shifts. (MCI Ex. 20, at 6-7 and Fig. 20-a). To process customer orders and answer customer inquiries, MCI proposes to utilize staff from existing MCI business centers backed by MCI's computerized on-line customer information system. (MCI Ex. 14, at 12-22).

64. MCI's base stations will be equipped with alarm systems which will notify the CNMC of any problems. (MCI Ex. 20, at 1-2). Unscheduled maintenance will be handled by MTSO or Base Station Maintenance Specialists. (*Id.*, at 7-8). The central switch is supported internally with a variety of on-line diagnostics which will identify any disturbance. (MCI Ex. 17, at 9). MCI's base sites will be routinely inspected once a month when Base Station Specialists will check output power, voltages and currents, receiver performance, and battery conditions. (MCI Ex. 20, at 7-8). MCI will stock a full complement of spare parts to support both preventive and corrective maintenance activity. (*Id.*). MCI's technical staff

will also be furnished with a range of testing instruments to measure and analyze the basic parameters of the equipment. (*Id.*).

65. *Practices*. AMCOM has a comprehensive program to guard against discrimination in hiring and will recruit minorities for employment in all aspects of cellular operations. (AMCOM Ex. 26, at 54). AMCOM will also make available training programs and provide other assistance to minority entrepreneurs. (AMCOM Ex. 30 at 60-62). There is also minority equity participation in AMCOM's proposal due to the participation of Stellar, an entity owned entirely by minority individuals. (*Id.*, at 13).

66. CMS has established a plan to fund the creation of at least three local minority and/or female controlled organizations to engage in resale and service functions with respect to CMS' cellular service in Portland. (CMS Ex. 9, at 12-13). CMS also proposes to reserve a full voting position on its Board of Directors for a Consumer Affairs Representative. (CMS Ex. 7, at 4). Finally, CMS proposes a customer service center, supported by its parent, to handle customer complaints and inquiries. (*Id.*, at 4 and App. A).

67. Interstate will offer a ten-day free trial period of its cellular service which does not include free air time. (Interstate Ex. 15, at 11). Interstate has also proposed a sales and distribution agency agreement which offers agents a 50 percent discount on the monthly access charge and an air time discount of 15 percent. (Interstate Ex. 11, at Att. 7, Ex. A, 18-19). The STS alleges that the agency agreement contains numerous clauses that seem to discourage agency and competition. (STS P.F., at paras. 56 and 82). MCI has unspecified plans to promote resale, but has not specifically provided for encouragement of minority participation in its cellular system operations or marketing. (MCI Ex. 12, at 14).

68 *Facilities*. AMCOM, CMS, and Interstate all propose the primary or exclusive use of equipment manufactured by Motorola. AMCOM will utilize the Motorola EMX-500 Mobile Telephone Exchange as its central switching facility as well as Motorola base station transmitters and cell site controllers (AMCOM Ex. 24, at 28 and Ex. 29, at 2 and 4). CMS will utilize the EMX-500 central switch, initially in a "250" configuration. Cells 1 through 7 in CMS' system will be equipped with Motorola base site controllers and RF equipment while cell 8 will employ a Graphic base site controller and E.F. Johnson RF equipment. (CMS Ex. 4 , at 2-3 and Ex. 9, at 5). Interstate proposes to install a Motorola Dyna T.A.C. Cellular system initially utilizing an EMX-250 central switch. (Interstate Ex. 11, at 5 and Ex. 15, at 4).

69. MCI proposes to use the AXE-10 cellular switch manufactured by Anaconda Ericcson. For its base station facilities, MCI will use UHF transmitting and receiving equipment manufactured by SRA Communica-

tions which has been specifically designed to operate with the Ericcson central switch. (MCI Ex. 17, at 1; Ex. 18, at 1; and Ex. 25, at 7).

Conclusions

70. This proceeding involves the mutually exclusive applications of American Mobile Communications of Washington and Oregon, Cellular Mobile Systems of Washington, Inc., Interstate Mobilephone Co., and MCI Cellular Telephone Co. for authority to construct and operate a new cellular telephone system in the Portland, Oregon/Washington SMSA. All four of the mutually exclusive applicants have been found by to be legally, technically, financially and otherwise qualified to be non-wireline cellular licensee for the Portland SMSA.[30] In order to determine what disposition would best serve the public interest, the Commission consolidated the four applications for hearing upon the three issues which are discussed below.

Issue (a)

71. Issue (a) Involves the comparison of the geographic areas which the applicants propose to serve, the relative demand for service in those areas, and the ability of each applicant's proposed system to accommodate the anticipated demand for local and roamer service. The Commission has determined that the geographic area to be served is a major factor of comparison. *Cellular Communications Systems,* 86 FCC 2d 469, 502 (1981) (Report and Order). In comparing proposed service areas, consideration shall be given to the presence of densely populated regions, highways and other areas likely to have high mobile usage characteristics as well as indications of substantial public need for the services proposed, including the results of public need surveys. *Id.*

72. *Geographic Area and Population.* For purposes of comparison, the geographic area that an applicant proposes to serve includes that area within its proposed 39 dBu contours, which, in turn, falls within its proposed CGSA and the relevant SMSA. *Designation Order, supra.*, at para. 39, footnote 18. All of the applicants propose to serve the most major population and employment centers (such as downtown Portland) as well as most traffic corridors likely to have high mobile usage. Interstate's 39 dBu contours will provide the greatest geographic coverage with service to 43.08 percent of the geographic area of the Portland SMSA. In contrast, the contours of AMCOM, CMS and MCI will cover 33.75 percent, 28.55 percent, and 32.57 percent, respectively, Regarding population coverage, Interstate's 1,574 square mile service area will serve an estimated 1,186,608 people (95.49 percent of the total Portland SMSA population). AMCOM's proposed coverage is the next largest, covering 1,233 square miles and 1,174,559 people (94.52 percent). MCI's system will

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[30] *Designation Order, supra.*, at para. 33.

cover 1,190 square miles and 1,161,051 people (93.43 percent), while CMS' proposal covers 1,043 square miles and 1,140, 008 people (91.74 percent).

73. Interstate's proposed system is clearly the largest in terms of coverage. Interstate proposes to serve nine percent more of the Portland SMSA and one percent (12,049 people) more population than AMCOM.[31] Compared to CMS, Interstate will serve an additional fifteen percent in area and four percent in population (46,600 people). Finally, Interstate will serve eleven percent more area and two percent (25,557 people) more population than MCI. Interstate will provide service to areas not served by AMCOM which include over 40,000 people, 835 businesses, 3,286 employees, over 2,000 high-income households, and some 25 miles of well-traveled highways, including seven miles of I-5, a major traffic artery in the Portland SMSA. In comparison with CMS, Interstate's exclusive coverage areas include more than 52,000 people, 1,046 businesses, the towns of Ridgefield and Battle Ground, WA and Canby, OR, and portions of various well-traveled highways (18 miles of I-5 alone) with a total ADT of 46,000 vehicles. MCI's proposal excludes service to a portion of Washougal, WA and other areas with more than 33,000 people, 555 businesses, and portions of several highways with a total ADT of 23,000 vehicles.

74. While there are some areas not served by Interstate that are served by other applicants, such areas appear to be relatively insignificant in comparison. AMCOM's two pockets of exclusive coverage total approximately one square mile with 130 people and no major highways. MCI's pockets total 10 square miles including 1,203 people and highways with an ADT of 1,000 vehicles. CMS' pockets total 18 square miles including 1,929 people and similar highway coverage superiority as that of MCI.

75. The other applicants acknowledge the raw coverage superiority of Interstate's proposal. They argue, however, that their proposals should be preferred because Interstate has proposed service to vast areas of very low population density where increases in demand cannot be anticipated. Thus, it is argued that Interstate has "overbuilt" its proposed system. Such contentions must be rejected. While the areas of exclusive Interstate coverage are at the periphery and are naturally of lower population density, that fact does not negate a need for cellular service. All of the applicants assert that cellular will, at least initially, be primarily a service utilized by businesses, and, to a lesser extent, high income people able to afford the relatively high cost of cellular service. The demographic data respecting the pockets of unique Interstate coverage include sufficient indicia to demonstrate a demand for cellular service in such areas which

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[31] The disparity in population coverage differences between the pocket analyses and the total system population coverage estimates appear to be explained by the different calculation techniques employed.

should be accommodated to provide adequate coverage to the Portland SMSA. Interstate's proposal will also clearly provide superior highway coverage which will benefit both local and roamer service. Finally, Interstate will provide its superior coverage with the same number of cells as AMCOM and MCI, and two fewer cells than CMS. Thus, the extra coverage proposed does not result from the costly construction of additional cells. In light of the superiority of Interstate's coverage proposal in all material respects, it will receive a comparative preference under this aspect of Issue (a).

76. *Relative Demand for Service.* The Commission has made an express finding of public need for cellular service, so no cellular applicant is required to make a separate showing of public need. However, the Commission did require comparative consideration of each applicant's showing of the extent of demand for cellular service in individual markets, *i.e.* the relative demands for service. *Report and Order, supra,* at 502, 503. Each of the applicants has conducted market research to determine the relative demand for cellular service in Portland, and each has formulated an estimate of the number of subscribers anticipated during the first years of operations. However, the demand studies for all four applicants are flawed in various respects which undermine their accuracy. Accordingly, no comparative preference will be awarded.[32]

77. The market research conducted for Interstate by Compucon relied exclusively upon secondary historical and demographic data, rather than primary market surveys, to estimate demand for cellular service in Portland. While Compucon's analysis may well be statistically valid, it relied upon a number of unjustified assumptions, *i.e.,* that the adjusted national mobile penetration rate would be applicable to first year cellular service in Portland and that the national penetration ratio for pagers would be applicable to the growth of cellular demand in Portland. The unreliability of the Compucon demand estimates was confirmed by the Gilmore market survey conducted for Interstate. The Gilmore study was based upon interviews with 192 Portland business and professional people and resulted in demand estimates far greater than those calculated by Compucon. Even when the Gilmore estimates are adjusted to reflect Compucon's more conservative one-third market share assumption, with the exception of the first year Gilmore's estimates still far exceed those of Compucon. The lack of primary data, the unjustified assumptions, and the contradiction of the Gilmore study all combine to create serious doubts as to the accuracy of the Compucon demand estimates upon which Interstate designed its proposed Portland system.

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[32] The flaws in Interstate's demand studies do not undermine its superior area and population coverage showing since the latter is based upon demographic data distinct from its demand studies.

78. AMCOM relied on Portland market surveys in determining its demand estimates. AMCOM's demand forecasts are principally based upon the ADL market study. AMCOM initially identified those "Industries and Occupations of Interest" with a history of high usage of mobile communications services and then conducted a telephone survey of executives and managers which resulted in a 9.7 percent interest factor. The interest factor was applied to the total Portland workforce in the Industries and Occupations of Interest and a penetration factor was then applied to estimate the effective market demand for that sector of the Portland workforce. AMCOM did not explain why surveyed demand among executives and managers is indicative of overall demand in the identified high-user businesses. Accordingly, it would appear that AMCOM's demand estimates for such businesses were inflated. To complete its business demand estimate, AMCOM merely assumed an initial .5 percent penetration factor which was applied to the "other employment" sector of the Portland workforce. While the unexplained penetration factor appears to be low, in fact it results in nearly half of the total business demand forecast by ADL. Thus, half of AMCOM's demand forecast appears to be inflated while the other half results from an assumed penetration factor rather than from any survey results.

79. While CMS' demand studies represent a considerable undertaking, they too contain serious flaws. CMS' basic assumptions that pager service is the precursor of cellular radio and that businesses will be the primary users of cellular service are undocumented. Such assumptions limited CMS' sample group without adequate explanation. CMS has also failed to establish that it actually used the results of its market research in its projections of demand and demand distribution for Portland. While CMS asserts that the various studies conducted were relied upon in projecting demand for Portland, it appears that the demand projections are in fact based upon CMS' categorization of three ranges of cellular demand for the top 30 SMSA's and the application of the mid-level demand factor of .0060 cellular units per 1,000 population to project demand for Portland. The need factor applied has no basis in the instant record. CMS has also failed to adequately explain how its estimated year five demand was distributed down to years one through four, and how its demographic data were used to project models of cellular usage.

80. MCI's public need survey interviewed more than 800 people in Portland. The application of an intent translation scale to the survey results yielded an estimate of realizable year one demand of 17,400 subscribers. MCI did not prejudge the nature of the cellular market in Portland by interviewing only businesses. MCI did, without adequate explanation, limit its sample to households having incomes of at least $20,000 before taxes. In light of the initial relatively high cost of cellular

service MCI's income assumption is not unreasonable. MCI's survey is somewhat flawed due to its failure to determine the authority and ability of the respondents to indicate the willingness of their business firm to purchase cellular service for their use. The major problem, however, is the failure to establish how the first five year demand projections were derived from the realizable demand estimate. While MCI indicates that various relevant factors were analyzed to derive its demand estimates, without further explanation of its calculations and operating assumptions the record will not support the levels of demand estimated.

81. *Ability to Accommodate Anticipated Demand.* All four of the applicants have designed their proposed systems with cells covering areas where significant need for cellular service can be anticipated. AMCOM's initial six cell system will have sufficient channel capacity to accommodate its first year forecast of 2,444 subscribers. CMS' first year system will have eight cells, sufficient to satisfy projected demand through year 5. In the first year, CMS will install sufficient equipment to accommodate its projected demand for that year. MCI's initial six cell system will have sufficient capacity to accommodate most of the demand projected through the second year of operations. Finally, Interstate will construct a first-year six cell system which will accommodate the 523 subscribers it projects for that year. While numerous allegations have been made regarding adjacent channel interference problems in the applicants' proposed initial systems, none of the allegations will be credited for the simple reason that the Carey Report does not address the question of adjacent channel interference and none of the applicants herein has demonstrated that there is any quantifiable and acceptable standard to be applied. All of the applicants have demonstrated their ability to accommodate the initial year demand that they project.

82. MCI has proposed to initially install more channels than are necessary which will enable MCI to accommodate unanticipated first year demand without expansion. AMCOM likewise will be able to expand its channel capacity rapidly to meet demand exceeding its initial design system capacity. The record also reveals that Interstate and CMS will be able to easily expand their systems to meet unanticipated first year demand through the addition of preassigned but unused channel capacity. Since all of the applicants have demonstrated their ability to accommodate both projected and unanticipated initial year demand, no comparative preference can be awarded for this subissue.

83. *Service to Roamers.* All of the applicants proposed to provide service to roamers. While AMCOM and Interstate propose manual roamer registration, CMS proposed fully automatic registration and MCI will be capable of providing a number of registration options ranging from fully automatic to manual. However, since the inconvenience of manual

registration is minimal and since cellular licensees will likely establish uniform roamer registration procedures at some time in the future, no preference will be accorded on the basis of mode of roamer registration proposed.

84. CMS deserves credit for proposing the use of a single, unchanging local roamer access number followed by the roamer's home system number. Such a proposal will allow a roamer in CMS' system to be dialed directly by a local caller without securing an assigned temporary directory number from the system operator. However, such credit is slight since operator intervention would still be required for local callers with rotary telephones and the inconvenience of calling the operator to get a roamer's temporary number is slight. CMS proposes to charge local roamers the same access fee and usage charges as local subscribers. Both AMCOM and MCI would charge roamers the same usage charges as local subscribers following the payment of a roamer access fee. MCI proposes to charge $5.00 per day with a maximum of $20.00 per billing period, while AMCOM's registration fee is not specified. Interstate proposes an access charge of $1.00 per day plus a surcharge of $.10 per minute for peak period usage and $.05 per minute off peak. The registration charges proposed by CMS and especially by MCI might well serve to discourage roamers from using cellular service while in Portland for short periods of time. CMS' registration charge for a single roamer call would be equivalent to the local subscribers' monthly access fee. MCI's registration charge for a single roamer call is essentially the same as CMS', and registration charges would exceed the local subscribers' monthly access fee after only three days. In contrast, the lower registration fees and small usage fee surcharge proposed by Interstate should not discourage such roamer use.

85. Interstate will be accorded a moderate preference for its proposal to accommodate demand for roamer service. Interstate's proposed roamer rates are preferable as they should not discourage intermittent roamer use. In addition, CMS' slight credit for its roamer dialing proposal is outweighed by Interstate's superior highway coverage. Since a need for roamer service on such highways can be anticipated due to the daily traffic volume figures reflected in the record, Interstate's proposed system will best serve the needs of roamers in Portland and will foster the Commission's goal of nationwide cellular service.

86. Interstate has been awarded a comparative preference for its superior area and population coverage and a moderate preference for its ability to accommodate demand for roamer service. Overall, Interstate proposes to provide the service which most adequately accommodates the need for both local and roamer service in the Portland SMSA. According-

ly, a substantial comparative preference is awarded to Interstate under Issue (a).

Issue (b)

87. This issue requires a comparison of each applicant's proposal for expanding its system capacity in a coordinated manner in order to meet anticipated increasing demand for local and roamer service. The *Designation Order* directs that preference should be given to designs entailing efficient frequency use, including not only the applicant's plans with regard to cell-splitting and additional channels, but also the degree of frequency reuse the system will be capable of, and the applicant's ability to coordinate the use of channels with adjacent or nearby cellular systems.[33]

88. AMCOM sets forth a theoretically sound general plan for system expansion. AMCOM's channel groups were assigned on the assumption that subscriber density will grow to the point that all omnidirectional cells will have to be subdivided and a four-cell sector reuse pattern implemented. Its expansion plan follows a logical progression from the initial addition of channels through cell splitting on a sector transmit basis when the capability of expansion through sector transmit has been exhausted. Through the first three years of operation, AMCOM's six initial cells will operate in an omnidirectional mode. AMCOM proposes to add a seventh omnidirectional cell in year four. In year five, when frequency reuse first becomes necessary, AMCOM proposes to add six new cells, four of which will be sectored. In year five, AMCOM will service 8,331 subscribers with 489 channels with nine omni and four sector cells. To accomplish the changes in year five, AMCOM proposed to decrease the number of channels in five of its existing cells and reallocate these channels to its new cells. In year nine, AMCOM will add four new sectored cells resulting in a seventeen cell system with 13 sectored and 4 omni cells.[34] Once again, the number of channels in three existing cells will be reduced and reallocated to new cells.

89. AMCOM's initial addition of an omnidirectional cell prior to sectorization could be subject to the criticism that such expansion is inefficient. However, the placement of AMCOM's cell 7 transmitter appears to be located at the point which will be necessary when cell 7 is later sectorized. Accordingly, the initial addition of an omnidirectional cell will enable AMCOM to take advantage of the inherent trunking efficiencies of such operation without substantial risk that the cell 7 equipment

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[33] *Designation Order, supra.*, at footnote 19. See also: *Report and Order supra.*, at 502-503.

[34] Cells 2, 3, 7, 9, and 12 will apparently be converted to sector operation at some unspecified time between years five and nine.

will have to be relocated at a later time. Furthermore, while system retuning will be required in years five and nine, due to the modular nature of transmitters it is a relatively simple matter to remove transmitters from existing cells and to install such transmitters in newly added cells. Finally, the record will not support the arguments of Interstate, CMS, and STS that AMCOM's expanded system will experience interference due to 120 kHz channel spacing at several sectorized cells. AMCOM failed to assign frequencies to specific sectors, but the channels allocated to each group are capable of sector assignment with at least the recommended 630 kHz spacing. Accordingly, AMCOM has proposed a theoretically and practically sound proposal for expanding its initial system in a manner which will not result in system-degrading interference.

90. Interstate has proposed an expansion plan which also evidences an understanding of cellular design and expansion principles and which suffers from no inherent engineering defects. Interstate's frequency plan was developed from its distribution of demand to the cell level and accounts for the eventual need to expand the system through omni transmit reuse, sector transmit, and finally cell splitting. Interstate's initial six cell, omnidirectional system is anticipated to accommodate demand through year nine. Expansion during the first nine years is accomplished through channel addition. By year ten, when it is anticipated that the voice channel requirements will exceed the omni frequency plan expansion capability, two cells will be sectorized and extensive retuning will be required. As with AMCOM, the necessary retuning should present no great problem for Interstate. The following year Interstate proposes to add a split sectored cell, and a twelve cell reuse pattern will be implemented which retains the original cell sites and adds needed voice channels.

91. MCI has also presented a general plan which would allow for the expansion of its system in a coordinated manner. MCI has configured its initial six cell system with sufficient channel capacity to meet most of the demand anticipated through year two. Thus, unanticipated first year demand can be accommodated without expansion and further demand increases will be met through the addition of channels. The initial sectorization of MCI's downtown cell site to meet the expected larger demand in that area comports with cellular design principles and does not violate MCI's expansion methodology. Based upon its monitoring of actual traffic data, MCI will add channel capacity and new cell sites in the downtown Portland area during year three. The advantage of MCI's expansion proposal is that it affords great flexibility to easily adapt to the demonstrated needs of Portland cellular subscribers with a minimum of costly engineering modifications. However, MCI's generalized expansion

plan is not set forth in sufficient detail to warrant a preference on this basis alone.

92. CMS has also presented a theoretically sound system expansion plan. However, the record indicates that CMS' system would require significant fine-tuning before the implementation of its expansion plans would be possible. CMS' initial system is configured physically at the level for the fifth year of its demand forecast. Since CMS' system was designed upon a suspect demand distribution methodology, substantial modifications will be required if actual demand does not follow the patterns inherent in CMS' system design. Furthermore, CMS' concentration of overlapping cells results in a lack of uniform cell spacing. CMS proposes in year 5 to reuse channels at four sets of cell pairs which are separated by distances of between 16.6 and 21.1 miles. Since such separation distances are much less than the typical separations which CMS asserts are necessary for frequency reuse, it is apparent that CMS' proposed fifth year system reflects a serious potential for co-channel interference problems. Accordingly, CMS' expansion proposal is deemed to be deficient.

93. All of the applicants have specified a design grade of service for their respective systems. While CMS has specified the highest grade of service of 0.01, it has also designed its system for years four and five on the basis of a 0.05 GOS. While CMS asserts that it will monitor traffic and expand its capacity as necessary to ensure that its initial GOS is maintained, it has clearly not demonstrated its ability to accomplish its goal. The remaining applicants all propose a 0.02 GOS based upon differing Erlang per subscriber assumptions. Since there is no evidence in the record as to which Erlang assumption is correct, the assumptions are all acceptable.

94. All of the applicants, with the possible exception of MCI, will allow significant system congestion to develop before initiating system expansion. AMCOM, CMS and Interstate would allow the grade of service at the cell level to deteriorate to approximately 0.05 before taking any action. MCI asserts that it will continuously monitor traffic and will expand as necessary to maintain its design GOS. However, MCI's laudable objective is weakened by its failure to detail specific traffic congestion conditions which would cause it to initiate expansion. Without such specifics it is impossible to determine whether MCI might prematurely initiate expensive expansion steps in response to a temporary peak in demand.

95. Thus, it is concluded that both AMCOM and Interstate deserve moderate preferences for their expansion proposals. These applicants have demonstrated both their theoretical understanding of expansion principles and their ability to implement such principles to efficiently expand their proposed systems.

Issue (c)

96. This issue requires a comparative determination of the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching capabilities). In its *Report and Order*, 86 FCC 2d at 503, the Commission explained that while they are relevant, these areas of comparison will be generally less significant than those contemplated under issues (a) and (b). Specifically, the Commission noted that the adequacy of base station and switching facilities and related maintenance proposals may be an issue in comparative proceedings in some cases, but it is not expected that this will be a significant issue in general. The Commission also noted that personnel and practices will be significant only to the extent that they affect an applicant's ability to implement its proposal.

97. *Service Offerings.* Each of the applicants will offer a variety of features in addition to basic telephone service. While MCI's market research established a need for three service features unrelated to the capabilities of its subscriber equipment, all four of the applicants will offer those three service features so MCI will not receive any comparative credit. The service offerings of the remaining three applicants are completely unsupported by any demonstration of public need, so no comparative credit for these offerings will be awarded.

98. *Rates, Charges and Classifications.* None of the applicants adequately describes the methodology used to formulate their proposed rates. Accordingly, a determination of whether the rates proposed are realistic is not possible. The preference here is, thus, not based upon the level of the rates proposed, but rather upon the rate structure[35] which will best enhance development and use of cellular resources. On this basis, CMS deserves a preference.

99. CMS will charge a lower monthly access fee than the other applicants ($4.95, vs. $15 for MCI, $16.00 for AMCOM and $25.00 for Interstate). Interstate, unlike the other applicants, has bundled 60 minutes of air time into its access charge which is likely to either discourage usage-sensitive customers from subscribing to Interstate's service or will encourage the indiscriminate use of the system (making unnecessary calls or not deferring such calls to off-peak hours) which presents the risk of artificially induced system congestion.

100. CMS, Interstate and MCI propose to bill only for air time used after connection with the party being called, the same as landline telephone service. AMCOM, however, proposes not to bill for any use of

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[35] See, *Houston Mobilfone, Inc.*, 65 FCC 2d 848, 858-59 (Rev. Bd. 1977), reversed on other grounds, *sub. nom. Mobilphone Services* v. *F.C.C.*, 605 F. 2d 572 (D.C. Cir. 1979).

the system lasting less than 20 seconds. AMCOM asserts that its proposal will result in billing for all time actually used, including call set-up, but will discourage wasteful use such as letting a phone ring for an excessive period of time. While AMCOM's proposal is innovative, the record does not support the awarding of a preference. There is no evidence presented that demonstrates that charging only for connection time will result in subscriber abuse. Furthermore, AMCOM's proposal itself could be subject to abuse through repeated short communications for which no usage fee would be billed.

101. Another factor which affects system usage is the billing time unit for billing purposes. At least in the initial stages of the development of cellular service, it is desirable to minimize the incentive to subscribers to extend the air time used per call beyond that time actually needed to complete the communication. This is best accomplished by a billing time unit which most closely results in billing only for time actually used. CMS proposes to bill for six second increments after the initial 30 seconds of each call. The other applicants all propose one minute incremental billing. Accordingly, CMS' proposal is to be preferred.

102. Incentives which encourage subscribers to defer non-essential communications to off-peak hours are also important to ensure the most efficient use of system capacity. CMS' three-tiered pricing structure is preferable to the two-tiered structures proposed by the other applicants, even if only a small number of calls will actually be deferred to the hours of least system use. CMS' proposal to offer data services to utilize off-peak capacity will also result in the more efficient use of available spectrum. In contrast, AMCOM's off-peak air time discount only applies to bulk users with more than 100 units.

103. AMCOM and Interstate propose specific bulk service discounts for which they seek a preference. No preference will be awarded, however, as the rules require that the cellular licensee make service available to resellers and both discount proposals suffer discontinuity problems. Finally, MCI and AMCOM seek a preference based upon their proposals to avoid the pass through of intra-CGSA toll charges. MCI's proposal is too speculative as it depends upon the method of interconnection to the landline network, a matter which will be negotiated at a later date. AMCOM's proposal likewise deserves no preference as the connection charges that it would impose might well exceed the toll charges thereby avoided.

104. *Personnel, Maintenance, Practices and Facilities.* As noted above, the Commission has directed that personnel proposals will be significant only to the extent that they affect an applicant's ability to implement its proposal. All of the applicants have established a management structure for their proposed systems, and all rely to some extent

upon the expertise or personnel resources of their corporate parents or constituent partners. No preference will be awarded to any of the applicants on the basis of their personnel proposals as none of the proposals are likely to so clearly enhance the applicant's ability to implement its proposed service that a preference must result.

105. The management structure proposed by all of the applicants is deemed to be adequate to implement and manage their proposed cellular systems. Interstate's claim of a preference based upon local control is unwarranted as all the applicants propose to hire a manager or other person who will be in charge of local Portland operations. Nor must a preference be awarded on the size of the staff proposed by each applicant. The proposed systems vary in size, and, accordingly, in staffing requirements. Awarding a preference on the basis of absolute size of the proposed staff might reward inefficiency and high fixed costs which would be passed on to the subscribers.

106. No preference will be awarded to any applicant on the basis of its maintenance proposal. The applicants have been found to be technically qualified to operate their proposed systems, and they have all presented maintenance proposals which are theoretically acceptable. All have proposed systems which incorporate redundancy in critical equipment, continuous system monitoring with both personnel and various alarm systems, and periodic preventive maintenance procedures. The technical staff proposed to be hired either have requisite experience or will receive training to ensure competency. Accordingly, there is no evidence of record that would support the conclusion that one proposal is superior to the others, and no preference will be awarded.

107. Neither will any comparative preference be awarded on the basis of the facilities proposed by any of the applicants. All four applicants have proposed technically acceptable facilities and the record clearly reflects the ability of each applicant to construct cellular systems technically capable of providing high quality cellular service. Neither the communications experience of any of the applicants or their affiliates nor other aspects of the applicants' proposals will necessarily ensure the speediest implementation of cellular service.

108. Finally, no preference will be awarded on the basis of minority participation, either through equity ownership or operations, in the proposed cellular systems. Current Commission precedent will not support the award of a minority participation preference in cellular licensing proceedings.[36]

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[36] See, Tampa Designation Order, No. 83-823, Mimeo 5820, at footnote 8, released August 10, 1983.

Ultimate Conclusion

109. Interstate has been awarded a substantial comparative preference under Issue (a) for its proposed superior geographic area and population coverage, as well as for its ability to accommodate demand for roamer service. Both Interstate and AMCOM have received moderate comparative preferences under Issue (b) for their superior system expansion plans. Under Issue (c), CMS has been awarded a comparative preference for its superior rate structure. The preferences awarded to AMCOM and CMS respectively, however, do not outweigh Interstate's substantial preference under Issue (a) and moderate preference under Issue (b). Thus, based on a review of all the comparative criteria and the comparative preferences awarded in this proceeding, it is concluded that, on a comparative basis, Interstate's application is superior to those of the other applicants, and that the public interest, convenience and necessity will be better served by a grant of Interstate's application and a denial of the applications of AMCOM, CMS, and MCI.

110. The ultimate conclusion reached herein is further bolstered by the fact that Interstate has previously been selected as the non-wireline licensee for the Seattle, Washington cellular system. See, CC Docket No. 83-3, *Initial Decision* (FCC 83D-55), released September 20, 1983. The Commission has indicated that the provisions for nationwide compatibility and universal interconnection with the MTS network resulted in an anticipation that no particular weight would be given to arguments concerning the public benefit of regional systems. *Report and Order, supra.*, at footnote 49. While the benefits of a regional system were not considered prior to the choice of Interstate as the superior applicant, the choice of Interstate will likely result in regional system efficiencies and an ease of adjacent system coordination which will redound to the public benefit.

111. Accordingly, IT IS ORDERED, that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion[37], the application of Interstate Mobilephone Co. for a construction permit to establish a new cellular system operating on Frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Portland, Oregon/Washington Standard Metropolitan Statistical Area, IS GRANTED, and the mutually exclusive applications of American Mobile Communications of Oregon and Wash-

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[37] Pursuant to the Designation Order, exceptions to this Initial Decision, under Section 1.276 of the Commission's Rules, shall be taken directly to the Commission. In the event that exceptions are not filed within 30 days after the release date of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(c).

ington, Cellular Mobile Systems of Washington, Inc., and MCI Cellular Telephone Co. ARE DENIED.

112. IT IS FURTHER ORDERED, that the grant to Interstate is conditioned upon its obtaining the appropriate antenna structure clearances.

FEDERAL COMMUNICATIONS COMMISSION
JOHN M. FRYSIAK, *Administrative Law Judge*

Contour, Interference
Contour, Measurements

In calculating the HAAT of the radiation center of the antenna along pertinent radials the Commission's rules provide that elevations between 2 to 10 miles from the antenna site shall be employed. Commission does not consider terrain shielding in its computer evaluation of low power television and television translator applications, since there is no universally accepted method of predicting the effects of terrain shielding.
Arnold N. Applebaum

FCC 84-569

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Application of Arnold N. Applebaum For a Construction Permit for a New Low Power Television Station on Channel 19 Paso Robles, California	File No. BPTTL-8203190X

MEMORANDUM OPINION AND ORDER

Adopted: November 21, 1984; Released: November 30, 1984

BY THE COMMISSION:

1. The Commission has under consideration an Application for Review filed January 9, 1984, by Arnold N. Applebaum ("Applebaum"). The Application for Review seeks review of a December 9, 1983, action by the Mass Media Bureau staff denying Applebaum's Petition for Reconsideration and returning the above-captioned application as unacceptable for filing.

2. Applebaum filed his application for a new low power television station on Channel 19, to serve Paso Robles, California, on March 19, 1982. The application was returned by letter dated September 30, 1983, because the proposed facility would cause objectionable interference to television station KCSO-TV, Modesto, California, and, thus, was unaccept-

able for filing. Applebaum resubmitted his application on October 30, 1983, along with a Petition for Reconsideration and a detailed Technical Exhibit. A Supplemental Terrain Study was submitted on November 3, 1983. By letter dated December 9, 1983, the Bureau denied Applebaum's petition and returned his application again. The letter noted that the "petition for reconsideration suggests that, due to terrain shielding, the Grade B contour of KCSO-TV does not extend into the area of Arnold N. Applebaum's proposed service, nor would Applebaum's proposed facilities cause interference to KCSO." The letter stated that the Commission had specifically rejected consideration of terrain shielding when adopting the low power television rules.

3. In his Application for Review, Applebaum argues that the staff's action was based upon an erroneous finding as to a material fact. Specifically, he claims that the Technical Exhibit submitted on October 30, 1983, demonstrated full compliance with the Commission's technical requirements without reference to terrain whatsoever. Applebaum claims that his application is in full compliance with the Commission's rules. Secondly, Applebaum suggests that the staff conducted a cursory review which indicated that interference with KCSO would occur. However, Applebaum claims that we should use the more detailed and accurate calculations furnished by his consultant which indicate that no interference would occur. Finally, Applebaum states that if the staff's calculations are used, and they indicate interference would occur, a waiver should be granted because of terrain shielding.

4. In an August 8, 1984, response to a staff request for additional technical information, Applebaum clarified his earlier engineering exhibits. Applebaum states that his initial interference analysis prepared in conformance with the Commission's rules indicated that interference would occur. In order to attempt to refute this showing of predicted interference, Applebaum recalculated the height above average terrain along the interference radials using the complete 140-mile path profile instead of the 2 to 10 mile profile as required by the Commission's rules. Applebaum claims that this study is more detailed and accurate than the staff's analysis or his initial analysis.

5. It is clear that use of the entire radial to calculate HAAT, as Applebaum has done, is a backdoor attempt to utilize terrain shielding by factoring in the height of mountains located 40 to 50 miles from the transmitter. Moreover, Section 73.684(d) of the Commission's Rules clearly provides that, when calculating the height of the radiation center of the antenna above average terrain along pertinent radials between the transmitter site of the proposed station and the station to be protected, the elevations between 2 and 10 miles from the antenna site shall be employed. These calculations are used for contour determination in the

low power television service as well as full-service television. Section 74.705(c) of the Commission's Rules details the information for calculating the field strength of a low power television or television translator station which is used to determine interference to a full-service television station. Section 74.705(c) states that the proposed effective radiated power (ERP) and the antenna height above average terrain (HAAT) in the pertinent direction is used. Further, Section 74.705(c)(1) and (2) provides that the F(50,10) charts and F(50,50) charts of Section 73.699 of the Commission's Rules shall be used to calculate field strength of the proposed station's signal. To use the charts contained in Section 73.699, the HAAT on the radial in question must be determined using the elevations between 2 and 10 miles from the antenna site as outlined in Section 73.684 of the Commission's Rules. *See Field Strength Curves*, 53 FCC 2d 855 (1975). Use of a HAAT calculated on the terrain elevation along the entire 140 mile radial in question, as urged, would invalidate the use of the charts in Section 73.699. *Holston Valley Broadcasting Corporation*, FCC 84-453, released September 28, 1984.

6. In addition, the Commission has previously considered the use of terrain shielding in evaluating low power television and television translator applications on two occasions. In the *Low Power Television Report and Order*, 51 RR 2d 476 (1982), the Commission noted that although it had originally proposed to consider terrain shielding, our experience with interim applications had demonstrated that it was far beyond our staff capacity to evaluate individually thousands of terrain shielding claims. The Commission declined to adopt any standard terrain correction factor based on the limited information it had before it.

7. Again, in the *Reconsideration of the LPTV Report and Order*, 53 RR 2d 1267 (1983), the Commission declined to consider terrain shielding in evaluating low power television and television translator applications and stated:

> Initially, we note that there is no universally accepted method of predicting the effects of terrain shielding. It would be beyond the scope of this proceeding to adopt a general terrain correction factor, even if we had sufficient information to enable us to do so. Under these circumstances, any attempt to allow for terrain shielding would embroil us in disputes that may not be susceptible to resolution by accepted standards and would therefore frustrate our efforts to expedite grant of low power licenses. [*Reconsideration*, 53 RR 2d at 1274.]

8. Applebaum has failed to demonstrate that terrain shielding should be considered or that his interference calculations should be used instead of the interference calculations based on the Commission's rules. Moreover, consideration of requests to waive the Commission's interference rules based on terrain shielding would embroil us in the very kinds of disputes we sought to avoid and slow the establishment of a nationwide low power television service. Those seeking waivers in these circumstanc-

es, therefore, have a heavy burden. Applebaum's brief showing, based on an unacceptable method of computing interference, coupled with the absence of any significant public interest considerations, simply fails the test.[1]

9. In view of the foregoing, IT IS ORDERED, that pursuant to Section 1.115 of the Commission's Rules, the Application for Review filed by Arnold N. Applebaum IS DENIED.

10. IT IS FURTHER ORDERED, That the Mass Media Bureau send a copy of the *Memorandum Opinion and Order* by Certified Mail — Return Receipt Requested to the applicant named herein.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[1] We recognize that our failure to consider terrain correction factors may preclude television translators at locations from which interference free operation may be possible. However, given the backlog of approximately 30,000 applications, most of which can be successfully processed pursuant to our standard interference guidelines, we believe that complicating our acceptance criteria at this time to include terrain studies is not desirable and would substantially delay further implementation of the low power television and television translator service.

Message Telecommunications Service
Tariff, Cost support material
Tariff, Investigation
Tariff, Suspension

Order suspended tariff revisions, proposing to implement an optional calling plan called PRO America. An investigation into the lawfulness of these revisions also instituted. Suspension and investigation based on inadequate cost justification for the filing and indications in the record that PRO America may be priced below cost.
—*AT&T Communications*
CC Docket No. 85-128

FCC 85-223

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON D.C. 20554

In the Matter of	CC Docket No. 85-128
AT&T Communications Tariff F.C.C. No. 1	Transmittal No. 301
PRO America Optional Calling Plan	
Alascom, Inc. Tariff F.C.C. No. 1	Transmittal No. 313
Block-of-Time Call America	

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1985; Released: May 2, 1985

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING AND ISSUING A STATEMENT.

I. Introduction and Background

1. AT&T Communications (AT&T) has filed tariff revisions, scheduled to become effective May 1, 1985,[1] to implement a new optional calling plan

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[1] These revisions, filed February 12, 1985, were originally scheduled to become effective March 29, on 45 days' notice, but were deferred until May 1 by letter to AT&T dated March 21, 1985.

called "PRO America."[2] Petitions to reject or suspend and investigate these revisions have been filed by MCI Telecommunications Corporation (MCI), GTE Sprint Communications Corporation (GTE Sprint), Satellite Business Systems (SBS), Lexitel Corporation (Lexitel), TDX Systems, Inc. (TDX), Competitive Telecommunications Association (CompTel), General Communication Incorporated (GCI),[3] and US Telecom, Inc. (US Telecom).[4] For the reasons discussed below, we are suspending the above-captioned tariff revisions for the full statutory period and instituting an investigation into their lawfulness.

2. Under the PRO America plan, a customer would pay a monthly charge of $25[5] and receive a 15 percent discount on all domestic interstate MTS dial station calls per main billed account. The 15 percent discount would apply during all rate periods and would be calculated by discounting the customer's total MTS interstate dial station bill. A nonrecurring service order charge of $10 would be waived during the first 90 days that the offering is available in a service area. The plan is targeted to those customers who use over six hours of interstate dial station MTS in a month, which translates into a monthly bill of at least $167. Customer billing for PRO America would be provided through billing contracts with local exchange companies. As of the tariff's effective date, the plan would be accessible nationwide to about 84 percent of all telephone subscribers. AT&T expects this figure to rise to approximately 95 percent by September 1985.[6]

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[2] Alascom, Inc. (Alascom) has filed a virtually identical plan, Block-of-Time Call America, which is also scheduled to become effective May 1, 1985. Sections 61.38 and 61.58 of the Commission's Rules, 47 C.F.R. §§ 61.38 and 61.58, have been waived for Alascom pursuant to Special Permission No. 85-203. Our discussion of PRO America will implicitly apply to the Alascom plan and the action we take with respect to the AT&T plan will be dispositive of Alascom's plan as well.

[3] GCI's petition requests solely that application of PRO America to northbound MTS services to Alaska and any similar plan filed by Alascom for southbound calls from Alaska be deferred until the Commission disposes of GCI's application for review of AT&T's Block of Time optional calling plan and its petition to reject Alascom's nearly identical optional calling plan for southbound MTS services. In light of the action we take in this order, GCI's request is moot.

[4] Also before the Commission is AT&T's reply to these petitions. In addition, MCI and GTE Sprint have filed supplemental pleadings in response to data which were for the first time disclosed in AT&T's reply. AT&T also filed an opposition to MCI's supplemental pleading. Because the data contained in AT&T's reply appear to be critical to a complete analysis of PRO America and should properly have been submitted with AT&T's initial filing, we will accept these pleadings under these limited circumstances. As a general rule, however, such unauthorized pleadings will not be considered. We have also received a number of letters and informal comments urging approval of PRO America.

[5] The monthly charge under Alascom's plan is $26.75.

[6] AT&T withdrew its proposal to apply PRO America to service originating in Puerto Rico and the U.S. Virgin Islands by Special Permission granted March 22, 1985.

II. Contentions of the Parties

3. The main argument raised against PRO America is that it is priced below cost and, therefore, is unlawful and perhaps predatory. Petitioners uniformly assert that AT&T has overstated the revenues to be generated by this offering while understating its costs. AT&T concedes that PRO America would not recover all its costs in 1985, but contends that the plan would be sufficiently profitable to cover all costs by 1986, including the 1985 start-up costs.[7]

4. At the heart of the petitioners' challenge to the profitability of PRO America is their claim that AT&T has unreasonably and without support inflated the demand response to this offering. AT&T states that its Rate Evaluation System (RES) model yielded a price elasticity of –1.5 and that the proposed rate reductions would, therefore, stimulate a 28 percent increase in demand. It asserts that the level of this elasticity figure is consistent with the highly competitive nature of the dial station business MTS market. MCI, however, argues that the elasticity should be only –0.6, based on the estimate used by the Commission in assessing demand response to the recent 6.1 percent across-the-board MTS and WATS rate reduction.[8] At most, according to MCI, the appropriate elasticity for an MTS rate change should be –0.9, based on AT&T's own RES documentation.[9]

5. AT&T replies that the –0.6 price elasticity suggested by MCI is too low because the 6.1 percent rate reduction was applied equally to all categories of service and thus did not affect any one user group differently from others. Consequently, AT&T continues, the existing rate relationships of message service alternatives were maintained, resulting in a lower price elasticity. PRO America, on the other hand, is targeted at a specific MTS market segment, business dial traffic, which, according to AT&T, has a higher price elasticity than the MTS category as a whole.[10] Moreover, AT&T contends that a higher elasticity is justified because "no

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[7] According to AT&T, the revenue shortfall for 1985 would be about $2.1 million. In 1986, AT&T claims, revenues would exceed costs by $11.4 million and in 1987, net earnings would rise to $31.9 million.

[8] According to MCI, at a price elasticity of –0.6, a 15 percent price cut will stimulate a 9 percent increase in demand.

[9] *See* AT&T Tariff Filing Reference Package 1303 at 2-45. This elasticity figure assumes no change in WATS or competitors' prices in response to an MTS rate change. When WATS and competitors' prices do move in proportion with MTS price changes, the price elasticity estimated by RES is –0.74.

[10] In this regard, AT&T asserts that the appropriate elasticity must also be higher than the category average of –0.9 since the PRO America offering would not decrease rates for such relatively inelastic MTS subcategories as international, operator, AT&T card or person calls.

substantial competitor price reaction [is] anticipated."[11]

6. Petitioners cite this latter point as the major flaw in AT&T's elasticity estimate since any response by competitors could substantially reduce demand for PRO America. AT&T states that "[c]onsideration of the effect of competitive response was included in the development of the churn factors."[12] As noted by GTE Sprint and SBS, however, AT&T fails to quantify these churn factors or explain how they were developed. MCI points out that AT&T's claim that competitors will not respond is inconsistent with another assertion in its D&J that customers of other common carriers (OCCs) will benefit from PRO America since AT&T's competitors can be expected to respond with similar rate plans.[13] Petitioners further argue that AT&T's assumption of no competitive response belies the OCCs' claim that, given the inferior quality of their access to the local exchange network, they cannot compete with AT&T unless the price differential between their services remains at or above a particular level.

7. Petitioners also question AT&T's assumption that WATS will experience a cross-elastic effect with PRO America. For example, GTE Sprint argues that AT&T is wrong in estimating a high repression of WATS usage because PRO America is "targeted specifically at dial station MTS users whose usage does not justify WATS service."[14] MCI, on the other hand, criticizes AT&T's failure to explain why no cross-elastic effects can be expected with services other than WATS.

8. MCI also states that AT&T's argument that its high price elasticity estimate is justified by the high level of competition in PRO America's target market[15] is contradicted by AT&T's figures on average customer bill size. MCI points out that while AT&T claims that its competitors have achieved twice the saturation in the $250-$5000 per month market that they have in the $0-$250 per month market segment, AT&T assumes that most PRO America customers will have average monthly bills below $250. Based on AT&T's calculations and assumptions, MCI claims that the average monthly bill size of customers joining PRO America in 1987 will be only $114, while GTE Sprint claims that the average bill size will be

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[11] AT&T Reply at 17 (filed Mar. 11, 1985).

[12] AT&T Transmittal No. 301, Description and Justification (D&J) at 14.

[13] *See* D&J at 4.

[14] GTE Sprint Petition at 14 (filed Feb. 27, 1985). GTE Sprint further notes that to the extent that revenue per minute in 1985 is 29.1 cents under PRO America compared to only 24.5 cents for WATS, it is not rational to assume that customers will opt to pay more under the PRO America offering. In this respect, MCI questions why stimulated revenue per minute increases through 1987 while revenue per minute due to cross-elastic effects remains constant.

[15] AT&T states that its target population for PRO America consists of customers with monthly bills ranging from $167 to $1000.

$118.[16] MCI and GTE Sprint contend that this result is unreasonable since only customers with bills above $167 would experience savings with PRO America. This apparent inconsistency does not surprise petitioners, however, since they argue that AT&T has a clear incentive to understate average customer bill size. As MCI explains, assuming a small average bill size allows AT&T to understate the losses that result from selling PRO America minutes at prices below cost and to overstate the number of total PRO America customers and hence the revenue generated by the fixed monthly charge.[17]

9. The claim that PRO America is priced below cost, according to petitioners, is borne out by the numbers. For example, MCI estimates that AT&T's out-of-pocket costs of access and billing are 20.9 cents per billed minute. It alleges that the additional per minute rates for PRO America fall below this amount for all calls in the night/weekend period and all calls under 925 miles in the evening rate period. MCI also estimates that, based on AT&T's data, additional minute rates fail to cover short run incremental costs, 32.7 cents per billed minute in 1985,[18] for all evening, all night/weekend, and all daytime calls below 293 miles in length. AT&T responds that there is no requirement that a service be profitable in each specific rate period or for every duration of call or particular length of haul; the only relevant inquiry, states AT&T, is whether the service is profitable as a whole.

10. As previously noted, petitioners argue that AT&T has attempted to justify this pricing scheme by overstating revenues and understating costs. MCI contends that, based on AT&T's data, incremental revenue per minute for PRO America will be 29.4 cents for 1985, 33.4 cents for 1986 (a 14 percent increase) and 37.2 cents for 1987 (a 26 percent increase over 1985), and that AT&T has failed to provide an explanation for these assumed revenue increases. AT&T argues that MCI's revenue calculations are understated because it has used a constant figure for revenue per stimulated minute for these years. AT&T states that this is misleading because customers with high MTS dial station usage are generally more aware of new telecommunications options and can be expected to

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[16] Because these figures represent the average bills of customers joining PRO America in that year, they exclude existing customers. According to AT&T, the average monthly bill for all PRO America customers, *i.e.*, customers joining in the year involved plus any existing customers, ranges from $285 in 1985 to $186 in 1987.

[17] GTE Sprint has submitted charts and graphs that illustrate this point. For example, in 1985 (assuming a –1.50 elasticity) PRO America would have a shortfall of $498,000 with an average customer bill of $238; this shortfall would rise to $21,042,000 with an average customer bill of $600. Letter from General Regulatory Counsel, GTE Sprint, to Chief, Common Carrier Bureau, March 22, 1985.

[18] This includes the incremental cost of access, billing, maintenance, traffic expense, and promotion. It excludes the incremental cost of network expansion and other costs.

subscribe to PRO America earlier than lower volume users. Hence, AT&T concludes that as more lower volume users purchase the plan, the revenue per minute will gradually increase because of change in the proportion of non-usage revenue to usage revenue. GTE Sprint suggests that MTS revenue per minute should actually fall over the next few years as a result of implementation of the customer access line charge which will force AT&T to reduce its MTS rates. Such a reduction would in turn reduce revenue for the PRO America offering.

11. Similarly, with respect to costs, MCI states that AT&T estimates billing costs to be 3 cents per minute for PRO America in 1985 and 1986, but estimates that the billing cost will be 0.5 cents per minute in 1987 without offering any explanation for this 83 percent drop. MCI also questions AT&T's calculation of access costs. It states that AT&T's estimate of total access cost per billed conversation minute is 17.3 cents in 1985. For 1986 and 1987, however, MCI argues that AT&T changes its methodology and calculates access costs per billed conversation minute of only 11 cents and 8.9 cents, respectively. MCI estimates that access costs will be at least 14.6 cents in 1986 and 13.8 cents in 1987.

12. Furthermore, petitioners challenge AT&T's contention that demand stimulation attributable to PRO America will reduce the carrier common line charge per unit by spreading non-traffic sensitive (NTS) costs over larger minute volumes, on the grounds that AT&T's demand estimates fail to distinguish between new, truly stimulated minutes and captured minutes. TDX, for example, notes that to the extent PRO America merely has the effect of attracting customers from a competitor or from another AT&T service, no reduction in access costs will be realized.[19]

13. Much of the difficulty in accurately assessing the costs and revenues associated with the PRO America filing, according to petitioners, stems from the numerous deficiencies in AT&T's cost support data. Indeed, it is only in its reply, MCI notes in its supplemental pleading, that AT&T first submits such information as its estimated price elasticity of –1.5 and the estimated number of customers electing PRO America each year. Even after filing its reply, MCI claims, AT&T has still not provided certain cost information such as its forecast of NTS and traffic sensitive costs for 1985-1987.

14. GTE Sprint complains that AT&T has not provided any data pertaining to the development of the $25 monthly charge or the 15 percent discount. SBS questions the validity of the survey used in arriving at these levels in light of AT&T's failure to disclose the questionnaire or

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[19] SBS points out that AT&T made this same argument with respect to its Block of Time filing and that it was rejected as speculative. *See* AT&T Communications, Inc. (Transmittal No. 79), Mimeo No. 4711, released June 6, 1984.

statistical results. GTE Sprint further asserts that AT&T has failed to submit information concerning development of the weightings used by AT&T to determine the nationwide weighted average service order cost estimate. It also states that it is unclear whether AT&T has included in its costs the service order expenses incurred but unrecovered due to the waiver of the $10 nonrecurring charge.

15. Petitioners also state that the absence of baseline financial views for 1986 and 1987 thwarts a proper analysis of PRO America's profitability. AT&T states in its filing that it has used the 1985 baseline financial view as a "proxy" for the 1986 and 1987 baselines "because no financial view of these years presently exists."[20] TDX, however, questions how AT&T can reconcile this statement with its submission of "adjusted" financial views for those same years.

16. This apparent inconsistency notwithstanding, TDX argues that this information may be irrelevant anyway since AT&T is attempting to show that PRO America implicitly complies with the "net MTS revenue" standard, suggested in the *MTS Guidelines Rulemaking*,[21] which the Commission has not yet acted upon. SBS adds that AT&T does not even satisfy this alternative standard since it has failed to explain adequately its assumptions regarding demand, costs and revenues.

17. In a similar vein, GTE Sprint rebukes AT&T's use of a fully distributed cost methodology for the message service category as a whole. It alleges that this categorization is in violation of the Interim Cost Allocation Manual which requires that costs be allocated to individual service categories, *i.e.*, MTS and WATS.

18. Based on their purported showing that PRO America is priced below cost, petitioners contend that the offering is unjust and unreasonable and, thus, unlawful.[22] All the petitioners assert that this pricing strategy is anticompetitive. Some even suggest that it rises to the level of predation. They maintain that given the timing of this filing — the year in which a large percentage of equal access presubscription will take place — the continued viability of competition in the interstate telecommunications market could be threatened by allowing PRO America to go into effect. Petitioners argue that as costs increase during the conversion period, any further reductions in OCCs' rates would seriously strain their financial resources, particularly since PRO America is targeted at those segments of the MTS market where the OCCs have made their greatest

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[20] AT&T D&J at 21.

[21] Guidelines for Dominant Carriers' MTS Rates and Rate Structure Plans, CC Docket No. 84-1235, FCC 84-564, released Jan. 9, 1985.

[22] Petitioners contend that the offering is unlawful under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). *See* AT&T (WATS) 59 FCC 2d 671, 678 (1976) and cases cited therein.

competitive inroads. At the same time, however, it is asserted that if OCCs do not continue to offer a sizeable discount,[23] they will not attract a sufficient number of customers to justify their conversion and network expansion costs.

19. Moreover, petitioners contend that allowing PRO America to take effect now could effectively negate the purpose of the *MTS Guidelines Rulemaking* since much of the harm that such an optional calling plan might cause may have already occurred by the time the Commission issues an order in that proceeding. Hence, they urge the Commission, at the very least, to suspend the PRO America filing pending the adoption of standards against which the reasonableness of this plan can be properly judged. AT&T responds that the Commission's consideration of new guidelines for optional calling plan tariffs does not warrant suspension of the PRO America tariff since this filing is justified under existing guidelines.

20. To the extent that PRO America does not cover costs, petitioners further allege that it is unreasonably discriminatory in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), because it forces small MTS users to subsidize large ones (*i.e.*, those with monthly bills exceeding $167) so that AT&T is able to continue earning its full authorized rate of return. In this respect, as Lexitel suggests, the tariff would also be discriminatory in that there would be two sets of rates for identical MTS service, thus producing different charges for the same amount of MTS usage.[24] AT&T responds to these discrimination charges by arguing that low volume MTS customers will benefit from the introduction of PRO America since it will increase AT&T's profitability and that PRO America does not cause MTS market segmentation, but responds to a segmentation created by AT&T's competitors.

21. Finally, several petitioners allege that the tariff also discriminates between single-line and multi-line customers subscribing to PRO America since it is unclear whether multi-line customers pay only one recurring monthly charge for all lines associated with a main billed account.

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[23] According to GTE Sprint, the average discount for MTS customers without the PRO America plan is in the range of 14 to 16 percent for customers with bills over $150. The discount is sharply reduced as customer bill size increases, it continues, reaching a low of 2 to 3 percent for customers with bills of up to $3000.

[24] MCI adds that this discrimination cannot be justified under the traditional test of competitive necessity and that the offering does not even meet the relaxed requirements for a showing of competitive necessity recently suggested by the Commission. *See* Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923, 948 (1984). MCI also suggests that Commission decisions require that a carrier relying on competitive necessity to justify a tariff filing must affirmatively raise and support such a claim, which AT&T has not done with respect to PRO America.

III. Discussion

22. As an initial matter, we recognize that as competition in the telecommunications marketplace increases, AT&T must be afforded a reasonable degree of regulatory leeway to respond to that competition. We also recognize that, in many cases, rate reductions carried out by carriers will result in beneficial effects both for the carriers, through the stimulation of new traffic, and for their customers. We often have sought to encourage rate reductions in order to realize these benefits. It is for these reasons that we have undertaken to review our regulatory policies concerning AT&T in the *MTS Guidelines Rulemaking* and the *AT&T Inquiry*.[25] It is also incumbent upon us, however, to exercise care in reviewing new AT&T offerings because of our desire to promote fair competition in the interstate telecommunications market. To the extent AT&T could be said simply to be meeting the competition through the introduction of PRO America we would not find it objectionable. But insofar as there are indications in the record that this offering may be priced below cost (indeed, AT&T admits as much for 1985), questions of lawfulness are raised warranting suspension under Section 204(a) of the Act, 47 U.S.C. § 204(a).[26] Suspension for the full statutory period will give the Commission an opportunity to determine if, in fact, PRO America is noncompensatory, during which time possible harm to competition will have been averted. The deficiencies in AT&T's cost support data, particularly with respect to AT&T's demand estimates, make an investigation necessary.

23. To justify a tariff filing on the basis of meeting competition while, at the same time, assuming there will be no competitive response seems questionable.[27] AT&T's assumption is inconsistent with the assertion of the OCCs that they must maintain a price differential to attract and retain customers (primarily because of the inferior quality of their access to the local exchange network). By making such an assumption regarding competitive response, of course, it appears that AT&T is able to inflate its projected demand stimulation, thereby overstating revenues generated by the PRO America offering. Moreover, AT&T fails to differentiate between new traffic stimulated by this plan and traffic that would otherwise be lost if no new offerings were introduced.[28] Since traffic that

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[25] Long-Run Regulation of AT&T's Basic Domestic Interstate Services, 95 FCC 2d 510 (1983).

[26] Arguments that below-cost pricing renders PRO America unlawfully discriminatory under Section 202(a) of the Act, 47 U.S.C. § 202(a), will be addressed in our investigation.

[27] AT&T's attempt to justify a high elasticity with a market segmentation argument (i.e., the target market for PRO America is more competitive than the MTS category as a whole) is also inconsistent with its use of a fully distributed cost methodology for the message service category as a whole.

[28] *See* D&J at 15 and Figure 2.

would be lost in the absence of this offering is not "new" traffic but rather appears to be existing traffic which AT&T claims it will retain, AT&T's demand estimates are further skewed by artificially inflating the estimation of "new" traffic stimulation. Similarly, on the cost side, AT&T's aggregation of new traffic and traffic captured from competitors raises questions as to whether stimulated demand will drive per unit NTS costs down as far as claimed.

24. The filing also raises questions with respect to AT&T's estimates of cross-elasticity. On the one hand, as GTE Sprint suggests, AT&T may have overstated the cross-elastic effect with WATS in order to show greater demand for PRO America. On the other hand, it is equally plausible, given AT&T's claim that WATS is the only service cross-elastic with PRO America, that the cross-elastic effects of PRO America have been understated so as to minimize revenue loss for the message service category overall. Since AT&T has not examined any services other than WATS for cross-elastic effects with PRO America, we are unable to conclude that AT&T has adequately supported its demand estimates.

25. It also appears to us that understatement of the average customer bill size of PRO America subscribers may have resulted in understatement of revenue loss. See para. 8 and n.17, *supra*. As the average bill size increases, so does revenue dilution. Given the sensitivity of PRO America's profitability to demand elasticity and average customer bill size, AT&T's assumptions must be subjected to especially close scrutiny.

26. Although we accept petitioners' showing that PRO America may be noncompensatory, we do not believe that a competitive response aimed at a highly contested market is necessarily predatory *per se*. At the same time, however, while we recognize the need to adopt more flexible standards for evaluating competitive filings, a tariff filing may not be the appropriate context for so doing. Hence, for the reasons discussed, suspension and investigation is warranted.

IV. Designation of Investigation Issues

27. We shall conduct an investigation into the reasonableness of the data and assumptions underlying the PRO America filing. AT&T will be required to respond to the investigation questions set out below within 30 days of the release of this order. Other parties interested in participating in this investigation must either notify the Commission within that time frame or file a reply to AT&T's direct case not later than 15 days' thereafter. The specific issues to be investigated are:[29]

1. In view of the fact that PRO America would only affect a portion of the MTS customer base, explain how the RES model, which is designed to estimate

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[29] Additional issues may be designated as we deem appropriate in light of the outcome of the *MTS Guidelines Rulemaking*.

demand for all MTS services associated with a general price change, can adequately account for the assumed price changes here.

2. How was the elasticity of demand used in the PRO America proposal (-1.5) calculated? Explain and justify each variable used. In addition, what basis did AT&T have for utilizing the -1.5 elasticity for the years 1986 and 1987?

3. Provide adjusted 1985, 1986 and 1987 financial views in the MR1 form with a summary sheet calculating demand based on elasticities of -1.0 and -1.25.

4. Since MTS and WATS are based on mileage bands of different sizes, how was the amount of traffic expected to be diverted from WATS mapped into the MTS structure? What is the distribution of messages, minutes and revenues, by MTS mileage band, AT&T expects to gain?

5. AT&T claims PRO America will allow it to retain customers who otherwise would be "lost" to competing carriers. What is AT&T's estimate of losses it would sustain without this service and what is the basis of these estimates?

6. How much of the traffic AT&T expects to gain is traffic that is retained and how much is new traffic? Of the new traffic, how much does AT&T estimate it will capture from other carriers?

7. AT&T has indicated that, after AT&T introduced its Block of Time plan, other carriers implemented similar plans. If this is the case, explain why AT&T assumed other carriers would not change their rates to respond to the PRO America offering.

8. AT&T developed churn factors to estimate the number of customers who would cancel the service. What was the value of these factors in each year? How were they estimated? How do the factors for PRO America compare with estimated and actual churn in other MTS optional calling plans? How was competitive response included in the factors?

9. AT&T's assumptions regarding revenue generated by PRO America and average number of customers joining PRO America each year suggests that average customer bill size may be unreasonably below or close to the cutover point of $167. Explain the basis for such revenue projections, including information on average customer bill size, average revenue per message and average number of messages assumed per PRO America customer.

10. Provide a breakdown of total PRO America revenues into monthly recurring, usage and service order revenues for 1985, 1986 and 1987 separately. Provide the basis upon which these numbers were derived.

11. Indicate the per minute rate used, by year, for carrier common line charges, local trunking and switching and other access charges in justifying PRO America. Provide the basis upon which these rates were derived. Provide your assumption on the total amount of cost savings from reduced access costs for each year. Provide the percentage of these reduced costs, by year, that are attributed to PRO America and the basis upon which this percentage was determined.

12. In Figure 4, AT&T shows earnings ratios for the total message service category. Provide information, in the same form, showing the earnings ratio for PRO America for 1985, 1986 and 1987.

V. Ordering Clauses

28. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201(b), 202, 204(a) and 205 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 202, 204(a) and 205, that the tariff revisions filed by AT&T Communications under Transmittal No. 301 and by Alascom, Inc., under Transmittal No. 313 ARE SUSPENDED until October 1, 1985 and an investigation is instituted into the lawfulness of the above-captioned tariff revisions.

29. IT IS FURTHER ORDERED, that AT&T Communications shall be a party to this proceeding. Any other interested person seeking to participate in this investigation may become a party either by filing a notice with the Commission not later than 30 days of the release of this order or by filing a reply case or comments in response to the direct case filed by AT&T Communications.

30. IT IS FURTHER ORDERED, that AT&T Communications shall submit its direct case responding to the investigation issues stated herein not later than 30 days of the release of this order. Other parties may file their reply cases or comments not later than 15 days thereafter.

31. IT IS FURTHER ORDERED, that *ex parte* contacts (*i.e.*, written or oral communications with a Commissioner or Commission staff members which address the merits of a proceeding, both procedural and substantive) are permitted in this proceeding until a public notice of scheduled Commission consideration of a final order or a final order itself is issued. Written *ex parte* contacts must be filed with the Secretary for inclusion in the public file. A written summary of oral *ex parte* presentations must be served on the Secretary and the Commission officials receiving each presentation. For other requirements, see generally Section 1.231 of the Commission's Rules, 47 C.F.R. § 1.1231.

32. IT IS FURTHER ORDERED, that the petitions to reject or suspend filed by MCI Telecommunications Corporation, GTE Sprint Communications Corporation, Satellite Business Systems, Lexitel Corporation, TDX Systems, Inc., Competitive Telecommunications Association, General Communication Incorporated and U.S. Telecom, Inc. ARE GRANTED to the extent described herein and otherwise ARE DENIED.

33. IT IS FURTHER ORDERED, that this order IS EFFECTIVE upon adoption.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Concurring Statement
of
Commissioner James H. Quello

In re: AT&T PRO America Optional Calling Plan

While I share some of the Common Carrier Bureau's concerns about record support for these tariff revisions, I am very concerned that we are unnecessarily depriving American business of significant rate relief. The primary question seems to be the credibility of AT&T's demand elasticity projections which necessarily are imprecise. Foretelling the future entails some risk and I believe the AT&T proposal is sufficiently credible to allow it to take effect and investigate simultaneously. However, since my colleagues prefer a more cautious approach, I am willing to support that position with the understanding that the investigation need not take the full five months permitted under the statute.

I urge the Bureau to move as expeditiously as possible to resolve reasonable concerns so that the benefits of these proposed revisions can be quickly enjoyed by thousands of small and medium sized businesses across the nation. To withhold this kind of relief a day longer than absolutely necessary would be a disservice to American consumers who must ultimately pay the tariffed rates.

Community Ascertainment of Needs, Sufficiency of
Community, Minority Faction Making up Separate Service Group
Deregulation
Programming Minority - Oriented
Programming Responsibility for

On remand from U.S. Court of Appeal by its own motion, Commission clarified that stations with non-specialized programming remain subject to the same standard as before our Radio Deregulation Order when their programming performance has been challenged namely, when there are specific allegation of fact, which if true, would establish that the licensee's overall programming could not reasonably have met the needs and interest of the people within its service area, including the Black community.

B/C Renewals (Ind., Ky., Tenn.)

FCC 85-317

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In Re Applications of Certain Broadcast Stations Serving Communities in the States of Indiana, Kentucky and Tennessee	BR-820401VI BRH-820401VH

MEMORANDUM OPINION AND ORDER ON REMAND

Adopted: June 13, 1985; Released: June 18, 1985

BY THE COMMISSION: COMMISSIONER RIVERA NOT PARTICIPATING.

1. This case arose from a petition to deny filed by the National Black Media Coalition (NBMC) and others against the license renewal applications of a number of broadcast stations in Indiana, Kentucky and Tennessee. The petition generally alleged that the stations had violated the Commission's equal employment opportunity (EEO) rule and, with respect to stations in Lexington, Kentucky, that they had ignored the special programming needs of the Black community. We denied the petition, concluding that it had not raised a substantial and material question of fact that warranted exploration in a hearing. *Broadcast Renewals (Indiana, Kentucky, Tennessee),* 54 Radio Reg. 2d (P&F) 1473 (1983), *reconsid. denied,* FCC 84-431 (Sept. 18, 1984). We did, however,

condition the renewal grants to nine of the stations, including the Lexington stations, on the licensees' submission of certain additional reports relating to their employment practices to permit us to monitor the licensees' implementation of their EEO programs and to assure full compliance with our EEO rule. 54 Radio Reg. 2d (P&F) at 1486.

2. With respect to the programming allegations directed at the Lexington stations, we concluded that the petition failed to make "specific allegations of fact, which, if true, would establish that the licensee's overall programming could not reasonably have met the needs and interests of the people within its service area, including the Black community." We emphasized that in the past we had made clear that the Commission would "not intervene in the programming area absent a clear showing that the licensee has ignored a strongly expressed problem of the community or has otherwise unreasonably exercised its wide discretion." We found nothing in the petition to support a conclusion that such abuse had occurred here. *Id.* at 1485-86.

3. NBMC filed a notice of appeal in the United States Court of Appeals for the District of Columbia Circuit seeking review by that Court of the Commission's action denying its petition. The appeal sought review only of the Commission's action with respect to two of the Lexington, Kentucky stations—WVLK-AM and WVLK-FM. *National Black Media Coalition v. FCC,* No. 84-1518 (D.C.Cir. filed Oct. 18, 1984). Upon review of NBMC's brief, the Commission's General Counsel moved the court to remand the case in order to permit the Commission to address more fully certain arguments raised by NBMC. The court granted that motion in an Order of April 16, 1985.

4. In its brief in the court of appeals, NBMC focused on several allegations that it asserted had been made in its pleadings before the Commission, but which, it said, had not been addressed by the Commission in its orders in this matter.[1] We believe that it would be useful in this order on remand to address the following of those allegations:

(1) NBMC asserted that the Commission's *Radio Deregulation*[2] decision created a greater duty for stations to provide program service to minorities in areas where there is an absence of program service for such minorities. NBMC alleged that Lexington was such an area and that these stations had failed their "heightened" responsibility to provide special programming for Blacks.

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[1] There is substantial question whether in its pleadings before the Commission NBMC articulated these points with sufficient clarity to require that our earlier order address them. However, now that the matter is before us on remand, it seems appropriate to address the allegations as framed by NBMC in its brief to the Court as if they had been made to the Commission in that form.

[2] *Deregulation of Radio,* 84 F.C.C.2d 968, *reconsid. denied,* 87 F.C.C.2d 797 (1981), *aff'd in part and rev'd in part, Office of Communications of the United Church of Christ v. FCC,* 228 U.S. App.D.C. 8, 707 F.2d 1413 (1983).

(2) NBMC alleged that Blacks had been excluded from non-entertainment programming on these two stations.

(3) NBMC asserted that the Commission had mischaracterized, and thereby failed to address, its allegations that the stations had failed to serve specific needs of Blacks.[3]

5. *Applicability of Radio Deregulation.* In its pleadings before the Commission, NBMC alleged that there had been a "market failure" in Lexington, Kentucky because, it asserted, "*no* radio station has even a Black-oriented program — music, news, or public affairs; religion, sports or educational — on the air at *any* time. . . . Blacks cannot *ever* tune to the radio and hear other Blacks on the air." Pet. to Deny at 5-6. NBMC asserted that in view of this alleged "market failure," the stations' "responsibilities . . . were heightened, not lessened, by deregulation." Reply to Opp. to Pet. Deny at 2. NBMC described what it believed to be a new "post-*Deregulation*" standard that the Commission should have applied in this case:

> Thus while each station in the country, pre-*Deregulation*, (and nearly each station post-*Deregulation*) is not obligated to respond to these "issues of particular relevance to the minority community" it is clear that the Commission intended stations such as WVLK-AM-FM to respond to those issues post-*Deregulation*. This requirement, apparently, is a small price the industry must pay in return for the far lower standard of scrutiny which most stations now have after deregulation. It is, however, the way in which the Commission wanted to insure that the need of Blacks and other minorities will be addressed under the new regulatory scheme.
>
> Even before deregulation, the Commission recognized that stations in communities with no other service at all had special obligations. *See, eg., Radio Station WSNT, Inc.*, 27 FCC 2d 993, 998 (1971). The post-deregulation correlate to WSNT is the instant case, where a station in a community where no other station addresses minority issues must have a special obligation to do so.
>
> Therefore the proper legal standard to be applied to these facts is whether WVLK-AM-FM, in light of the failure of any other station in the market to present any regular programming directed to the particular needs of Blacks, adequately met its post-deregulation obligations to present such programming.

Pet. Reconsid. at 3.

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[3] NBMC also claimed that WVLK intentionally segregated Blacks into clerical jobs at the stations. In our initial order, we found no basis for these charges. *See* 54 Radio Reg. 2d (P&F) 1482. *See also* WVLK Opp. to Pet. Deny at 8-11 and Exh. B. The licensee has voluntarily submitted a supplemental pleading that further supports this conclusion. *See* Supp. Pleading on Remand at 20-24. NBMC has filed a motion to strike the supplemental pleading. We agree that WVLK should have submitted this information as part of its earlier pleadings. However, there is no basis for the argument that we are without authority to consider such additional information under the circumstances of this remand. *See Eastern Carolinas Broadcasting Co. v. FCC*, No. 84-1174 (D.C.Cir. May 17, 1985) slip opinion at 7-13. No useful purpose would be served by ignoring the licensee's supplemental pleading, which does not seek to raise any new issues or to rely on any new legal arguments.

6. NBMC has misunderstood the import of our *Radio Deregulation* decision. That decision did contemplate that one result of the changes in our non-entertainment programming policies adopted therein could be the development of more specialized programming for particular groups. Specifically, *Radio Deregulation* gave a station for the first time the option, in appropriate circumstances, not to offer programming responsive to the problems and needs of all significant groups in the service area.[4] In the case of a station, for example, that previously had been obliged to serve a community composed of significant groups A, B and C, if this station no longer chose to serve group C, the likely result would be programming of more specialized interest to groups A and B. But *Radio Deregulation* did not require more specialization, a point which NBMC seems to overlook. We "stress[ed] that stations are not required to specialize and to take into account other radio services available in the community in planning their programming. Rather stations are being permitted to do so if they wish to and if they can justify their action if called upon to do so." 87 F.C.C.2d at 816.[5]

7. Thus, in the earlier example, the station is free, if it wishes, not to direct more specialized programming towards groups A and B and instead to continue its previous practice of broadcasting more generalized programming responsive to the entire community. No *duty* exists, before or after *Radio Deregulation*, to specialize with respect to any particular group or groups in a station's community, regardless of whether one or more stations in the community voluntarily attempt to specialize. WVLK has chosen not to specialize, and nothing in *Radio Deregulation* can reasonably be read to foreclose WVLK or any other station from making

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[4] A licensee who chooses to have a more specialized focus for its nonentertainment programming must be prepared to demonstrate, if its exclusion of programming for significant groups is questioned, that it reasonably relied on the availability of issue-oriented programming on other stations of particular relevance to the groups it had excluded. *See* 84 F.C.C.2d at 978-79, 992; 87 F.C.C.2d at 804-05, 816-17.

[5] It should also be noted that even if NBMC is correct in its characterizations of the radio market in Lexington, Kentucky, we expressly declined to adopt a "market failure" approach in the *Radio Deregulation* decision. *See* 84 F.C.C.2d at 1069-71; 87 F.C.C.2d at 803-04. *See also United Church of Christ*, 228 U.S.App.D.C. at 21-22, 707 F.2d at 1426-27. Thus whether there has been a "market failure" in Lexington in the sense that no radio stations are providing programming designed to serve the specialized needs of the Black community neither heightens nor lessens the responsibility of a station such as WVLK, which has not chosen to specialize. In any event, NBMC offered scant factual basis to conclude that such a "market failure" in fact exists, whereas the licensee has submitted substantial evidence of significant amounts of programming directed to both the general and specific needs of the Black community that its stations and other Lexington stations broadcast during this license period. *See* ¶¶ 10-11 below.

that choice.[6]

8. Contrary to NBMC's apparent view, it is clear that radio stations such as WVLK that choose not to specialize, do not have greater programming obligations after *Radio Deregulation* than they did before. We described our general goal in the *Radio Deregulation* proceeding with respect to programming obligations as being "intended to assure that broadcasters will have the maximum flexibility to be responsive to issues important to their listeners, with the minimum amount of governmental interference." 84 F.C.C.2d at 978. It would be inconsistent with this language, as well as with the plain intent of the entire *Radio Deregulation* proceeding, to interpret it as having imposed heightened programming responsibilities on stations or increased our scrutiny of that programming as NBMC has suggested.

9. In this case it is unnecessary to define precisely the nature of the programming obligations of non-specializing radio stations after *Radio Deregulation* because it was clear that WVLK met even the standards for programming that were applicable before *Radio Deregulation*. Under those principles, we did "not expect radio broadcasters to attempt to be responsive to the particular problems of each group in the community in their programming in every instance." 84 F.C.C.2d at 978. "Proportional programming has never been a requirement of the public interest. In fact, since all individuals have some general interests as well as special interests, it is inappropriate to expect special interest programming to be proportional to special interest populations." *Id.* at 991. We stressed that "no station, either prior or subsequent to deregulation, has ever been expected to cover all issues facing its community . . . That matter has been covered by ample Commission precedent." 87 F.C.C.2d at 816.[7] Those precedents make clear, as we pointed out in the initial order in this matter, that the standard that had been applicable when a station's programming performance was challenged was whether there were "specific allegations of fact, which, if true, would establish that the licensee's overall programming could not reasonably have met the needs and interests of the people within its service area, including the Black community." 54 Radio Reg. 2d (P&F) at 1485.[8] Even NBMC admits that this was the

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[6] WVLK asserted that it "has consistently endeavored to provide well-balanced programming that is responsive to the problems and needs of all significant groups in Lexington and surrounding areas." Opp. to Pet. Deny at 5.

[7] *See, e.g., Newhouse Broadcasting Corp.*, 59 F.C.C.2d 218, 224 (1976); *National Broadcasting Co.*, 52 F.C.C.2d 273, 281 (1975), *aff'd, National Org. for Women v. FCC*, 181 U.S.App.D.C. 65, 555 F.2d 1002 (1977); *Miami Valley Broadcasting Corp.*, 48 F.C.C.2d 177, 185 (1974).

[8] NBMC incorrectly relied on our decision in *Radio Station WSNT, Inc.*, 27 F.C.C.2d 994 (1971), to support the proposition that stations traditionally have been held to a higher standard of performance "in markets where no Black programming at all is available. . ."

appropriate standard prior to *Radio Deregulation* and that under this test, "the Commission did not abuse its discretion in holding that [WVLK] met the needs of the generalized (mostly white) audience in Lexington, Kentucky." Pet Recon. at 1-2 and n.3. Since, as we have discussed above, radio licensees' programming obligations have not been increased following *Radio Deregulation*, it is clear that the petition to deny here failed to raise questions that required a hearing on these stations' programming performance.

10. *Exclusion of Blacks from WVLK's Non-Entertainment Programming.* NBMC has asserted that it "explicitly argued to the Commission that WVLK-AM-FM had excluded Black spokespersons from its programming during the license term." NBMC Br. at 23. We fail to find such an "explicit" argument in NBMC's pleadings.[9] In any event, there was no factual support in the record for this argument. WVLK correctly asserted that the Commission has held that licensees may address the problems and needs of a minority group in programs other than programs devised and presented by members of that minority group. WVLK Opp. to Pet. Deny at 4. The record also showed that the stations had, in fact, presented Black leaders on their public affairs programs. *See id.* at 6 and Exh. C. In its supplemental pleading, WVLK has provided additional information that further supports the conclusion that NBMC's allegation that the stations had excluded Blacks is baseless. *See* WVLK Supplemental Pleading at 6-10 and Exhs. B and C.

11. *WVLK's Failure To Address Issues Of Particular Relevance to the Black Community.* To the extent that NBMC has alleged that we ignored its charge that the stations failed to address six issues of particular significance to the Black community (*see* Pet. Recon. at 4), that argument is founded principally on NBMC's erroneous view of the

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Reply to Opp. to Pet. Recon. at 1-2. *See also* Pet. Recon. at 3. That case involved charges, supported by substantial, specific factual allegations, that the only radio station licensed to a community that was 60% Black had failed to air programs concerning major local problems relating to racial conflict in the community and that the station's action was racially motivated. We designated the renewal application for hearing there because we believed that substantial questions had been raised concerning the station's "general practice of suppressing news of significant local events . . . [and] whether [the station] is meeting its obligation to serve the public by presenting important local news, and whether [the station] has failed to comply with the Commission's Fairness Doctrine . . . ." 27 F.C.C.2d at 996. That decision obviously does not stand for the proposition advanced by NBMC nor did NBMC present allegations in any way similar to those that were before us in *Radio Stations WSNT*.

[9] The assertion that the stations "excluded Black spokespersons" clearly implies an affirmative act on the part of the licensee. NBMC provides no factual support for such an assertion. The one-page affidavit that it submitted after its petition to deny was filed, which provides the sole factual basis for the petition, alleges only that "very seldom are Blacks invited onto local public affairs programs on radio as guests . . . ."

requirements of *Radio Deregulation.* It is well established that broadcasters ordinarily may meet their public interest obligations to provide programs that serve the needs and interests of the community through general interest rather than special interest programs. *See, e.g., Miami Valley Broadcasting Corp.*, 48 F.C.C.2d 177, 185 (1974), *National Broadcasting Co., Inc.*, 52 F.C.C.2d 273, 281 (1975), *aff'd, National Org. for Women v. FCC*, 181 U.S.App.D.C. 65, 555 F.2d 1002 (1977). Moreover, the record adequately demonstrated that the stations had been responsive to the entire community's needs. *See* Opp. to Pet. Deny Att. C. WVLK's Supplemental Pleading simply provides confirmation that the stations issue-oriented programs addressed the special needs and interest of Blacks in Lexington as well as general community needs. *See* Supplemental Pleading at 5-14 and Exhs. B and C.

12. Accordingly, IT IS ORDERED, That the "Motion to Strike Supplemental Pleading on Remand" filed on May 21, 1985 by the National Black Media Coalition is denied.

13. IT IS FURTHER ORDERED, That the General Counsel transmit this Memorandum Opinion and Order to the United States Court of Appeals for the District of Columbia Circuit.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Anticompetitive Practice, Common Carrier
Common Carrier, Authorization
Common Carrier, Negotiation to Avoid Hearing
Cross Interest
Damages, Punitive, Claim For
Divestment of Interests

Violations found of Sec.214(a) of Communications Act and Sec. 63.54 of Commission's Rules because telephone company constructed cable television systems within its service area without Commission authorization. Divestment of all prohibited interests ordered. Notice of apparent liability for forfeiture issued. Parties ordered to attempt negotiated settlement of damages issue. Commission found it lacks authority to award attorney fees and that complainant did not show FCC authority to award punitive damages.
—*Comark Cable Fund III*

FCC 85-116

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Comark Cable Fund III d/b/a CCI Cablevision, Complainant v. Northwestern Indiana Telephone Company, Inc. and Northwest Indiana CATV, Inc. d/b/a Northwestern Indiana Cablevision, successor to Rhys Mussman d/b/a Northwestern Indiana Cablevision, Defendants	File No. E-84-1

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted March 12, 1985; Released March 18, 1985

BY THE COMMISSION:

1. Comark Cable Fund III d/b/a CCI Cablevision (CCI), a former operator of a cable television system in Hebron, Indiana, seeks a cease and desist order against Northwestern Indiana Telephone Company, Inc. (NITCO) and Northwest Indiana CATV, Inc., d/b/a Northwestern Indiana CableVision (Northwest Cable) for conduct allegedly in violation of the Communications Act and the Commission's telephone/cable television company cross-ownership rules. For reasons fully discussed below, we find that Defendants and principals thereof have entered into agreements in violation of such rules, and that NITCO has constructed cable television distribution facilities without prior Commission authorization in violation of Section 214(a) of the Communications Act of 1934, as amended.[1] Therefore, we order NITCO to divest itself of all prohibited facilities and terminate prohibited affiliations with Northwest Cable. We are also issuing a Notice of Apparent Liability for Forfeiture against NITCO.

I. Background

2. On October 12, 1983, CCI initiated this proceeding by filing a complaint, pursuant to Section 208 of the Communications Act, against NITCO and Northwest Cable's predecessor, Rhys Mussman d/b/a Northwestern Indiana CableVision. The gravamen of CCI's complaint is that defendants are affiliated companies engaged in discriminatory and anticompetitive conduct in violation of the Act and the Commission's telephone/cable television company cross-ownership rules. More particularly, CCI alleged, *inter alia*, that NITCO was constructing and operating a cable television system in Hebron and constructing a cable television system in DeMotte, Indiana, both within its telephone service area, without Commission authorization and to CCI's detriment, in violation of Sections 202(a) and 214(a) of the Act and Section 63.54 of the Commission's Rules.[2] In addition to seeking the issuance of an order to show

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[1] 47 U.S.C. §214(a), provides, in pertinent part, that no carrier shall construct any interstate line without prior Commission authorization.

[2] Section 202(a) of the Act, 47 U.S.C. §202(a), provides as follows:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

cause why NITCO and Northwest Cable (Defendants) should not be ordered to cease and desist from such alleged violations, CCI also seeks compensatory and punitive damages and attorney fees.

3. On November 28, 1983, Defendants timely filed separate answers denying such violations and further denying that they were affiliated within the meaning of Section 63.54 of the Rules.[3] They asserted that Rhys G. Mussman resigned his position as Executive Vice President of NITCO on December 31, 1982 and that all dealings between Defendants since then concerning the construction and operation of Northwest Cable or its predecessor were at "arm's length" and with fair compensation to NITCO.

4. On December 12, 1983, in addition to its reply to Defendants' answers, CCI filed a motion seeking an order to make answers more definite. In addition, or in the alternative, CCI sought an order authorizing the use of immediate discovery prior to designation of its complaint for an adjudicatory hearing. By *Memorandum Opinion and Order*, unpublished, released April 18, 1984, CCI's motion was denied insofar as it sought full discovery prior to designation. However, NITCO was directed to file an amended answer providing certain additional information. Additional information was also requested of Northwest Cable. Separate amended answers were timely filed by Defendants on May 18, 1984.[4]

Section 63.54 of the Rules, 47 C.F.R. §63.54, proscribes, *inter alia*, the furnishing of cable television service to the viewing public by any telephone company within its telephone service area, either directly, or indirectly through an affiliated company. A telephone company also may not furnish pole space or other rental arrangements to an affiliated company where such arrangements would be used to provide cable television services within the telephone company's telephone service area. Affiliation in this connection is broadly defined to include "any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the customer, except only the carrier-user relationship." Note 1(a). *See* Cross-Ownership Rules, 82 FCC 2d 254, 264 (1980). *Cf.* Section 613 of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, Oct. 30, 1984.

[3] NITCO originally had been directed to either satisfy or answer CCI's complaint within 20 days. However, over CCI's objections, Defendants were granted an additional 10 days within which to file their answers because of our desire to have a full record before us. *See Memorandum Opinion and Order*, unpublished, released November 17, 1983.

[4] Also before us are CCI's Reply to the Amended Answers filed June 11, 1984, a Consolidated Motion for Leave to File Responses to that reply, and separate responses to the reply filed by Defendants on July 9, 1984; and CCI's Opposition to the motion, filed July 19, 1984. Because CCI's Reply presented new factual evidence for consideration, Defendants' motion is granted.

II. Findings of Fact

A. The Parties

5. CCI is a Florida limited partnership that held nonexclusive franchises for cable television systems in the towns of Hebron and DeMotte, Indiana. It has constructed a cable television system in Hebron. Service was commenced in December, 1982. CCI served about 375 subscribers in Hebron in October, 1983 when it filed its complaint. It subsequently sold its Hebron system.[5]

6. NITCO is an Indiana corporation and a communications common carrier providing telephone exchange services in Hebron, DeMotte, Lakes of the Four Seasons, and Mt. Ayr, Indiana.[6] It is a closely held family corporation controlled by Robert G. Mussman, its President, Chairman and one of three directors. Mr. Mussman owns 1050 of the company's 1100 shares of stock. The remaining 50 shares are owned by R. Gerald Mussman,[7] a director of the company and its Vice President. The third director and the company's secretary-treasurer, Myrtis E. Mussman, is Robert G. Mussman's wife. Until his resignation as Executive Vice President on December 31, 1982, their son, Rhys G. Mussman, was the highest salaried employee in the company after Robert G. Mussman. He continues as a consultant to NITCO and his fees for 1983 roughly equalled or exceeded his salary prior to his departure from the company as an employee. In his capacity as Executive Vice President, Rhys G. Mussman conducted cable television pole attachment negotiations with CCI's predecessor-in-interest, Telecom Services, Inc., during the last quarter of 1982.[8]

7. Northwest Cable is an Indiana corporation with cable television systems in the towns of Hebron and DeMotte, Indiana and Lakes of the Four Seasons, a planned residential development in unincorporated portions of Lake and Porter Counties, Indiana.[9] It received nonexclusive

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[5] Complaint at 2; letter to the Commission from Robert E. Levine, counsel for CCI, dated November 19, 1984.

[6] NITCO is also the radio licensee of station KSJ622 in the Public Land Mobile Service.

[7] R. Gerald Mussman and Rhys G. Mussman are different individuals.

[8] *Id.* at 3, 17-18; NITCO Answer at 1; NITCO Amended Answer at 6, 11, 13, 18, Exh. 16 at 93A; Reply to amended answers at 3-4; Response to reply to amended answers at 17, n.4.

[9] Northwest Cable has an application pending (FCC File No. CAR-22666-01) seeking authority to construct a station in the Cable Television Relay Service (CARS) to relay television signals via microwave radio from Hebron to DeMotte and Lakes of the Four Seasons, Indiana. CCI has filed a petition to deny such application. As of May 17, 1984, Northwest Cable represented that it had approximately 500 homes wired for service in the Four Seasons community, that the construction of its cable system at DeMotte was "nearing completion", and that it would begin service to the public in DeMotte as soon as the CARS facilities were authorized and constructed. Opposition to Petition to Deny filed May 22, 1984, at 11-12.

franchises for cable television systems from Hebron, Lakes of the Four Seasons Property Owners Association, Inc. (an Indiana not-for-profit corporation), and DeMotte on or about April 26, May 23, and August 1, 1983, respectively. Prior to its incorporation on April 4, 1983, Northwest Cable was operated as an individual proprietorship by Rhys G. Mussman, under the name Northwestern Indiana CableVision. It continues to operate under that name as a corporation. Rhys G. Mussman, Robert Mussman's son, serves as its president and its sole officer, director and shareholder. The company currently has three employees, one of whom was formerly NITCO's plant engineer.[10]

B. Agreements between Defendants or their principals

8. Several oral agreements were entered into between Defendants or principals thereof after Rhys G. Mussman's resignation as Executive Vice President of NITCO and while he continued as a consultant to the company. None of the agreements was reduced to writing until well after CCI filed its complaint. A consulting agreement between NITCO and Rhys Mussman never has been reduced to writing. The agreements are described below.

9. *Construction of Hebron cable television system.* In 1983, NITCO constructed a cable television system in Hebron for Northwestern Indiana CableVision pursuant to an oral agreement. The value of this construction was in excess of $70,800. A written contract for the maintenance of such system and construction of new lines was entered into on December 16, 1983 to become effective January 1, 1984.[11]

10. *Attachment to NITCO poles in Hebron.* On December 16, 1983, NITCO and Northwestern Indiana CableVision also reduced to writing their prior oral agreement by which cable television facilities could be attached to NITCO's poles in Hebron. The agreement calls for attachments at an annual rate of $4.00 per pole.[12]

11. *Construction of DeMotte cable television system.* Robert G. Mussman, on behalf of NITCO, and Rhys G. Mussman, for Northwestern Indiana CableVision, also entered into an oral contract by which NITCO constructed a cable television system in DeMotte, Indiana. That contract was not reduced to writing until May 14, 1984.[13]

12. *Construction of Four Seasons cable television system.* An oral agreement by which NITCO agreed to construct a cable television system for Northwestern Indiana CableVision in the community of Lakes of the

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[10] Northwest Cable answer at 1, 3, 10; amended answer at 2, 9, 11-12, Exh. 8, 11, 12, 13 at Attachment G.

[11] NITCO amended answer at 7-8, Exh. 3.

[12] *Id.* at Exh. 4.

[13] *Id.* at Exh. 1.

Four Seasons, Indiana similarly was not reduced to writing until May 14, 1984.[14]

13. *Attachment to NITCO poles in DeMotte and Lakes of the Four Seasons.* NITCO and Northwestern Indiana CableVision's agreement for pole attachments in Hebron was amended on May 14, 1984 to apply also to NITCO's poles in DeMotte and Lakes of the Four Seasons.[15]

14. *Lease of property at 301 North Washington Street.* Rhys Mussman, through Northwestern Indiana CableVision, has leased property, including office space, at 301 North Washington Street in Hebron from his father, Robert G. Mussman and his mother, Myrtis E. Mussman. The parties operated under an oral lease from January 1983 until May 14, 1984 when the lease was reduced to writing. The property is immediately adjacent to NITCO's headquarters address at 205 North Washington Street, which property also is owned by Robert and Myrtis Mussman.[16]

15. *Sublease of property at 205 North Washington Street.* On May 1, 1984, Northwest Cable entered into a written agreement with NITCO to sublease a portion of the real estate surrounding the commercial office building at 205 North Washington Street which NITCO leased from Robert and Myrtis Mussman.[17] Northwest Cable's earth station antennas and other cable television equipment are located on the property so subleased, which includes a cement concrete pad constructed in April 1982 for a satellite television antenna also erected at that time.[18]

16. *Consulting Agreement.* NITCO has employed Rhys G. Mussman as a consultant since his resignation. Such agreement has never been reduced to writing. Mr. Mussman has received more than $57,000 from NITCO in consulting fees since 1983 from which social security and income taxes have been withheld. He continues to be covered by NITCO insurance and pension plans and has been provided with office furnishings within NITCO's headquarters offices. His consulting fees from NITCO for 1983 amounted to about the same sum as or exceeded his salary from NITCO for 1982. Rhys G. Mussman has not drawn any salary from his own company, Northwest Cable.[19]

17. *Financial guarantees.* Robert G. Mussman and his wife personally guaranteed six bank loans to Northwest Cable in the current principal amount of approximately $450,000.[20]

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[14] *Id.* at Exh. 2.

[15] *Id.* at Exh. 4.

[16] *Id.* at Exh. 5, 6; complaint at Exh. D-1.

[17] NITCO amended answer at Exh. 5.

[18] *See* excerpts from transcripts of minutes of April 28, 1982 meeting of the Board of Trustees of Hebron, Indiana, attached as Exhibit A to CCI's consolidated reply to amended answers, at 4-5 and attachment.

[19] NITCO amended answer at 9-11, 13, 14, Exh. 16 at 93A.

[20] NITCO amended answer at 18 and Exh. 11.

18. Robert G. Mussman also personally guaranteed the obligations of Rhys Mussman to the Town of Hebron under an indemnity agreement of April 26, 1983 in connection with litigation Rhys Mussman initiated against CCI and the town, among others. It appears that Rhys Mussman's efforts to reexecute the agreement or otherwise assure the town of his financial ability to adequately undertake his cable television commitments without Robert Mussman's personal guarantee, have been unavailing.[21]

C. Special franchise provisions

19. Section 2(k) of the franchise granted Rhys Mussman on April 26, 1983 by the Town of Hebron provides:

> "Gross Subscribers Revenues" shall include any and all compensation or receipts derived by Grantee from the operation of the Cable Television System authorized herein, but shall not include any refunds or credits made to subscribers or any taxes imposed on the services furnished by Grantee, and *shall also not include consideration received directly or indirectly by Northwestern Indiana Telephone Company, Inc. from subscribers or users in payment of the receipt of signals other than broadcast television, radio or original cable cast programming of the Franchisee, whether for "Facsimile" transmission, "return" or "subscriber response communication", and whether or not transmitted encoded or processed to permit reception by only selected subscribers.* (emphasis added).

According to CCI, its Hebron franchise agreement does not contain a similar reference to "consideration received directly or indirectly" by NITCO.[22]

20. Section 22 of the franchise granted Northwest Cable or its predecessor on May 23, 1983 by the Lakes of the Four Seasons Property Owners Association, Inc. provides, in part:

> The term 'annual gross operating revenues' used herein shall not include any revenues received by Northwestern Indiana Telephone Company for services it may render to its customers within the franchise area. . . .[23]

D. Common use of Post Office Box

21. NITCO's business address, *i.e.*, 205 North Washington Street or P.O. Box 67 in Hebron, has been used commonly by NITCO and by members of the Mussman family. Mail addressed to that post office box has been delivered there by the local Post Office, including mail addressed to Rhys G. Mussman or Northwestern Indiana CableVision.[24] Also, mail sent to Rhys Mussman in Hebron with no address specified has been deposited in P.O. Box 67 by the local Post Office. Even though the proper address for Northwestern Indiana CableVision has been 301 North

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[21] Northwest Cable amended answer at Exh. 14; NITCO's answer at 6-7.

[22] *See* CCI's reply at 4-5.

[23] *See* Attachment G to Exhibit 13 of Northwest Cable's amended answer at 10-11. *See also* Attachment C to that exhibit.

[24] *See, e.g.*, letter 1982 to Rhys Mussman from the First National Bank, Valpariso, September 20, Exhibit 11 of the amended answer of Northwest Cable, at Exhibit J.

Washington Street since January 1983, P.O. Box 67 continued to be specified as Northwestern Indiana CableVision's address on correspondence delivered as late as April 1983.[25]

E. The Mussman family business connection

22. In his efforts to obtain cable television franchises from the towns of Hebron and DeMotte, Rhys Mussman did not hesitate to link himself with members of the Mussman family, especially his father, who had ties to the communities and their affairs for many years. In his November 25, 1980 proposal to the DeMotte Town Board to build and operate a cable television system, Rhys Mussman noted that he was currently "Executive-Vice President of the Northwestern Indiana Telephone Company Inc. . . ."[26] At an April 28, 1982 meeting of the Town Board of Hebron, Rhys Mussman represented that "my father is the Secretary-Treasurer" of Northwestern Indiana CableVision.[27] When Hebron granted Northwestern Indiana CableVision a franchise on April 26, 1983, subsequent to both Rhys Mussman's resignation as NITCO's Executive Vice President and Northwest Cable's incorporation, Robert G. Mussman guaranteed Northwestern Indiana CableVision's obligations to Hebron under an indemnity agreement of the same date.[28] Rhys Mussman also linked Northwest Cable to his father in an August 1983 letter to the DeMotte Town Board to express his dismay that the town had not awarded an exclusive franchise to Northwestern Indiana CableVision but one also to Telecom Services, Inc., a competitor and CCI's predecessor-in-interest. In his letter, Rhys Mussman (who was less than 30 years old) said it seemed odd that the town had also awarded a franchise to an out-of-state company rather than award a single franchise to "*the person* who has been helping the community grow for *over forty years* . . . ." (emphasis added).[29] Like Hebron, the Lakes of the Four Seasons Property Owners Association apparently also perceived a connection between Northwest Cable and NITCO and a need to distinguish between their revenues.[30]

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[25] *See, e.g.*, letter to Rhys Mussman from John Howard, April 19, 1983, Exhibit 11 of the amended answer of Northwest Cable of Exhibit A; NITCO amended answer at 14-15.

[26] Amended answer of Northwest Cable, Exh. 10 at unnumbered page 7.

[27] Exhibit A to reply to amended answers, at 6.

[28] *See* Northwest Cable amended answer, at Exh. 14.

[29] *See* August 1, 1983 letter to DeMotte Town Board from Rhys G. Mussman, President, Northwestern Indiana CableVision, in Exh. 11 of Northwest Cable amended answer; see also Response of Northwest Cable to CCI's reply to amended answers, at 2.

[30] *See* paras. 19 and 20, *supra*.

III. Discussion and conclusions of law

A. The telephone/cable television company cross-ownership rules

23. In our Final Report and Order in Docket No. 18509,[31] we considered "the anomalous competitive situation" between cable television systems which are affiliated with the telephone companies and those with no such affiliation, which must rely on attachments to the telephone companies' poles to construct their systems.[32] We recognized that the entry by a telephone company, directly or through an affiliate, into the retailing aspects of cable television service in a community within which it furnished telephone service could lead to "undesirable consequences" and anticompetitive abuses because of the telephone company's monopoly position over essential pole facilities within the community.[33] We concluded that:

> the public interest in modern and efficient means of communications will best be served, at this time, by preserving, to the extent practicable, a competitive environment for the development and use of broadband cable facilities and services and thereby avoid undue and unnecessary concentration of control over communications media either by existing carriers or other entities....

and adopted a policy barring "all telephone common carriers from furnishing [cable television] service to the viewing public in their operating territory except when, for good cause shown, a waiver of this policy is granted." We also precluded telephone common carriers from providing cable television service directly or indirectly to the viewing public by entering into pole rental agreements with their affiliates in communities where they provide telephone exchange service.[34] In adopting rules precluding a telephone company from providing cable television service within its telephone service area directly or indirectly through an affiliated company, we said we would "broadly interpret the concept of affiliation" and barred "any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and [cable television system], except only the carrier-user relationship."[35]

24. Defendants' pleadings demonstrate that they were aware of the Commission's telephone/cable television cross-ownership prohibition prior to any cable system construction or other organizational activity.[36] Indeed, as early as April 28, 1982, Rhys Mussman was advised at a meeting of the Board of Trustees of the Town of Hebron that there had

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[31] *Section 214 Certificates,* 21 FCC 2d 307, *recon. in part,* 22 FCC 2d 746 (1970), *aff'd sub nom. General Telephone Co. of the Southwest v. U.S.,* 449 F.2d 846 (5th Cir. 1971).

[32] *Id.* at 323.

[33] *Id.* at 324.

[34] *Id.* at 325.

[35] *Id.* at 325-26 and 331.

[36] NITCO and Northwest Cable answers, at 2.

"been a lot of changes recently" in the telephone/cable television cross-ownership rules that he might "want to check into". Exh. A to reply to amended answers, at 5. Further, after being served with the subject complaint, Defendants also were placed on notice that they risked sanctions if they continued their cable television activities.[37]

25. Prohibited relationships include, *inter alia*, any person having a financial interest, including interests other than ownership, in both a carrier and its customer.[38] Here, Robert Mussman not only controls the telephone company but also guaranteed repayment of substantial bank loans made to his son's cable television company, as well as guaranteeing certain obligations of his son to the Town of Hebron in connection with cable television franchise litigation. Although NITCO never has undertaken any non-tariffed construction project of more than $100,000,[39] Robert Mussman's telephone company entered into oral contracts with his son's cable company to construct cable television systems in Hebron, DeMotte, and Lakes of the Four Seasons involving amounts in excess of that sum. Such contracts were not reduced to writing until well after the instant complaint was filed. We also note that the terms of the oral agreement under which Robert Mussman's company has paid his son substantial consulting fees has never been reduced to writing. Although NITCO purportedly employs Rhys Mussman as a consultant, his fees in 1983 equalled or exceeded his salary in 1982 as an employee. In addition, withholdings and benefits he receives while purportedly serving as a consultant are indicia of an employer-employee relationship, a conclusion bolstered by the fact that Rhys Mussman has earned no income in his purported role in the cable side of the family business. Furthermore, Rhys Mussman represented at public proceedings his father's participation in the cable enterprise. These facts, together with all of the other facts set forth in paras. 5–22, *supra*, lead to the conclusion that NITCO and Northwestern Indiana CableVision, both before and after the latter's incorporation, have been, and continue to be, affiliated companies within

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[37] In April 1984, Defendants' attorney was cautioned that:

> any further construction and operation of cable television facilities by Northwest Indiana CATV, Inc. within NITCO's telephone service area without prior Commission authorization is at its peril and may be found to be in violation of the Commission's telephone/cable television company cross-ownership rules and subject to appropriate penalties under the Communications Act, 47 U.S.C. §151 *et seq.*, including divestiture.

Letter to David L. Nace dated April 18, 1984 from Chief, Enforcement Division, Common Carrier Bureau. Defendants' attorney also has been informally advised that action on Northwest Cable's CARS application (*see* n.9, *supra*) currently is being held in abeyance pending resolution of the instant complaint.

[38] 47 C.F.R. §63.54 at n.1(b).

[39] NITCO amended answer at 21.

the meaning of Section 63.54 of the Commission's Rules and that they are acting in contravention of the Commission's rules.[40]

26. Defendants' reliance upon cases concerning multiple ownership of broadcast and/or cable television interests and sections in Parts 73 and 76 of our rules is misplaced. Such cases are not controlling since the terms "control" and "affiliate" as used in Section 63.54 are much more broadly defined than are those or similar terms in other Commission rules which do not involve common carrier issues. The terms "control" and "affiliate", as defined in Note 1(a) to Section 63.54, preclude NITCO from affiliating itself directly or indirectly with any company owned by, operated by, controlled by, or under common control with it. Also precluded is "any financial or business relationship whatsoever . . ." other than the ordinary telephone company relationship with subscribers to its telephone services. *Cf.*, 47 C.F.R. §63.08(a).

27. Defendants also seek to justify their conduct by distinguishing certain cases in which the Commission disregarded the corporate facade of allegedly independent companies in order that the purpose of the Act and its regulations not be frustrated. They argue that they are independent companies dealing at arm's length and that there is no warrant for

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[40] Section 63.54, 47 C.F.R. §63.54, as amended, provides as follows:

> (a) No telephone common carrier, subject in whole or in part to the Communications Act of 1934, shall engage in the furnishing of cable television service to the viewing public in its telephone service area, either directly, or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the telephone common carrier.
>
> (b) No telephone common carrier, subject in whole or in part to the Communications Act of 1934, shall provide channels of communications or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such telephone common carrier, where such facilities or arrangements are to be used for, or in connection with, the provision of cable television services to the viewing public in the telephone service area of the telephone common carrier.
>
> Note 1: (a) *As used above, the terms "control" and "affiliate" bar any financial or business relationship whatsoever* by contract or otherwise, directly or indirectly, between the carrier and the customer, except only the carrier-user relationship. (emphasis added)
>
> (b) Examples of situations in which a carrier and its customer will be deemed to be controlled or having a relationship include the following, among others: where one is the debtor or creditor of the other (except with respect to charges for communication services); where they have a common officer, director, or other employee at the management level; where there is any element of ownership or other financial interest by one in the other; and where any party has a financial interest in both.

See also Cross-Ownership Rules, *supra*, 82 FCC 2d at 264.

the Commission "to pierce their corporate veils" as was done in the cases of *Dimension Cable TV, Inc.*, 25 FCC 2d 520 1970), *recon. denied*, 27 FCC 2d 43 (1971); *TeleCable Corporation*, 19 FCC 2d 574 (1969); and *Manatee Cablevision, Inc.*, 22 FCC 2d 841 (1970), *vacated on other grounds*, 35 FCC 2d 639 (1972). We note that such cases were designated for hearing before our telephone/cable television company cross-ownership rules were adopted. After adoption of these rules, there no longer is any need to designate cases for evidentiary hearings to determine whether telephone and cable television companies are under common business or financial control or whether they are nonaffiliated and truly independent of one another. Since 1970, when the rules were adopted, *any* financial or business relationship by a telephone company with an affiliated cable television system within its service area (other than the ordinary telephone customer relationship) is prohibited unless a waiver of the rules has been granted. Cable television service offered by an affiliated system is considered cable television operation by a telephone common carrier and is subject to the requirements of the rules "without any further necessity of piercing the corporate veil."[41] In light of the prohibition, NITCO would have had to obtain a waiver of such rule, and grant of authority pursuant to Section 214(a) of the Act, (*see* para. 29, *infra*) before entering into pole attachment and other agreements with Northwestern Indiana CableVision.[42]

28. Since we have found that Defendants are affiliated companies within the meaning of Section 63.54 of our rules and that they have, without prior Commission authorization, entered into pole rental and other agreements with respect to construction and maintenance of cable television system facilities in Hebron, DeMotte and Lakes of the Four Seasons, Indiana, communities in which NITCO provides telephone exchange service, we conclude that NITCO has violated, and continues to violate the rule. Accordingly, we are issuing a Notice of Apparent Liability for Forfeiture against NITCO in the amount of $20,000 in accordance with Section 503(b) of the Act, 47 U.S.C. §503(b), for willful

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[41] *Section 214 Certificates, supra*, 22 FCC 2d at 751. *See also Armstrong Utilities, Inc.*, 25 FCC 2d 385, 388 (1970); *D&E Cable TV, Inc.*, 28 FCC 2d 24 (1971).

[42] Section 63.56(a), 47 C.F.R. §63.56(a), as amended, provides as follows:

> In those areas where cable television service demonstrably could not exist except through a cable television system owned by, operated by, controlled by, or affiliated with the local telephone common carrier, or upon other showing of good cause, the provisions of §§63.54 and 63.55 may be waived, on the Commission's own motion or on petition for waiver, if the Commission finds that the public interest, convenience and necessity would be served thereby.

See also CATV Service Area Standard, 86 FCC 2d 983, 991 (1981).

and repeated violations of Section 63.54 of our rules.[43]

B. Section 214(a) certification

29. In *Section 214 Certificates, supra,* we properly disregarded the legal facade of separate corporate identities when the purpose of Section 63.54 of our rules would otherwise have been frustrated. Similarly, based upon undisputed facts of record here before us, the separate corporate identities of Defendants must be disregarded in order to preserve the integrity of the statutory scheme embodied in Section 214(a) of the Act.[44] It has long been settled that construction of cable facilities for transmission of broadcast television signals by a carrier constitutes construction of part of an interstate channel of communication requiring our prior certification under Section 214 of the Act that the present or future public convenience and necessity requires or will require such construction.[45] The fact that the cable television distribution facilities may be owned and operated by the cable television system, rather than leased from the telephone company, does not necessarily mandate a different result. *See Dimension Cable TV, Inc., supra,* 27 FCC 2d at 48.[46] While we have granted blanket authority to telephone companies to construct cable television distribution facilities *outside*of their exchange telephone service area, construction of such facilities by a telephone company *within* its exchange telephone service area for an affiliated cable system requires advance certification pursuant to Section 214(a) of the Act in order to, *inter alia,* ascertain compliance and enforce our cross-ownership rules before such construction may be lawfully undertaken.[47] On the basis of undisputed facts of record before us, we conclude that NITCO's construction of cable television systems for Northwestern Indiana CableVision, its affiliated cable television system, in Hebron, DeMotte and Lakes of the Four Seasons, Indiana without having received prior authorization violated Section 214(a) of the Act.

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[43] According to data in its annual reports, as filed with the Indiana Public Service Commission, we note that NITCO's net income after taxes for the years 1981, 1982 and 1983 exceeded $372,000, $475,000, and $756,900, respectively. NITCO's 1983 earnings equated to a return on equity in excess of 18%. *See* Exh. 15-17 to NITCO's amended answer, at 13, line 56, col. (c) and 16, line 37, col. (b).

[44] *See General Telephone Co. of Southwest v. U.S., supra,* 449 F.2d at 855.

[45] *General Telephone Company of California,* 13 FCC 2d 448, *recon. denied,* 14 FCC 2d 693 (1968), *aff'd.,* 413 F.2d 390, *cert. denied,* 396 U.S. 888 (1969). *See also C&P Tel. Co.,* FCC 85-48, released January 30, 1985, at para. 16.

[46] *See also General Telephone Company of the Southwest v. United States,* 449 F.2d 846 (5th Cir. 1971).

[47] *Section 214 Authorization,* 98 FCC 2d 355, 356 (1984), at n. 3.

C. Section 202(a) discrimination

30. We long have been concerned with unlawful discrimination vis-a-vis independent cable television companies by telephone common carriers with control over poles required for the construction of such cable systems.[48] Indeed, it was because of such concerns and the potential for anticompetitive abuses that we ultimately adopted our telephone/cable television cross-ownership rules. CCI has alleged that NITCO has engaged in anticompetitive conduct by offering more favorable terms and conditions for pole attachment to its affiliated company, Northwestern Indiana CableVision, than to its potential competitor for wideband cable distribution facilities, CCI. NITCO's conduct, in this regard, is alleged to be in violation of Section 202(a) of the Act.[49] In view of the actions ordered herein based on violations of Section 214(a) of the Act and Section 63.54 of our cross-ownership rules, we do not believe it necessary to reach CCI's contention that NITCO's conditions for attaching its poles are unreasonably discriminatory in violation of Section 202(a) of the Act.[50]

D. Liability for damages

31. As previously noted, in addition to a cease and desist order, CCI also seeks compensatory and punitive damages as well as attorney fees.[51] Having determined that NITCO has violated Sections 214(a) of the Act and 63.54 of our rules and that it is therefore subject to the damage provisions of Sections 206 through 209 of the Act,[52] we find that CCI is entitled to any consequential damages it can establish. The parties are encouraged to negotiate a reasonable and mutually agreeable settlement as to the amount of damages to which CCI may be entitled and to

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[48] *See, e.g., Warrensburg Cable, Inc.*, 67 FCC 2d 662 (1978) and cases cited therein at 667.

[49] *Cf. Better T.V., Inc. of Dutchess County, New York*, 31 FCC 2d 939, 966-67 (1971); *Warrensburg Cable, Inc.*, 67 FCC 2d 662, 667-72 (1978).

[50] We concluded, prior to enactment of Section 224 of the Act, that we lacked regulatory jurisdiction over telephone company activity that constituted simply rental of available space on utility poles. *California Water and Telephone Co.*, 64 FCC 2d 753 (1977). Under Section 224 of the Act, 47 U.S.C. §224, the Commission has authority to resolve disputes concerning alleged unreasonable conditions for attaching utility poles by cable television system operators. CCI did not seek to invoke such jurisdiction in its complaint.

[51] We have no power to award attorney fees and that request will be denied. *Strouth v. Western Union*, 70 FCC 2d 506, 511, 567 (1978); *See also Illinois Bell Telephone Co.*, FCC 80 M-181, released January 30, 1980, 46 R.R. 2d 1449 (1980) and cases cited therein. CCI also has not shown that we have authority to award punitive damages and that request too will be denied. *See Jean Gilhart v. The Chesapeake & Potomac Telephone Company of Maryland, Inc.*, unpublished, released October 2, 1984 at para. 5 (File No. E-83-21).

[52] Such sections provide, *inter alia*, for the recovery of damages before either the Commission or a district court of the United States of competent jurisdiction when a carrier does any thing prohibited by the Act or omits to do any thing required by the Act.

otherwise reach an acceptable resolution of this dispute. We expect the parties to promptly undertake good faith efforts to negotiate such a settlement and to report the results back to us in due course. Should they notify us that such efforts have failed, the Chief, Common Carrier Bureau, will determine such further actions as he deems necessary to resolve the issue.

IV. Conclusions and Ordering Clauses

32. Having found that NITCO and Northwest Cable are affiliated companies within the meaning of Section 63.54 of our rules and that they have, without prior Commission authorization, entered into pole rental and other agreements with respect to construction and maintenance of cable television system facilities, in continuing violation of such rule, we are issuing a Notice of Apparent Liability for Forfeiture against NITCO. Furthermore, because Defendants failed to obtain the necessary authorizations pursuant to Section 214(a) of the Act and 63.56(a) of our rules to construct and operate cable television systems in Hebron, DeMotte, Lakes of the Four Seasons, Indiana and any other areas in which NITCO provides telephone exchange service, NITCO shall, in the absence of such authorizations, be required to divest all facilities and terminate all affiliations between NITCO and Northwest Cable prohibited by Section 63.54.[53] NITCO will be directed to file within 40 days from the release of this order (a) its proposals to comply with our decision herein[54] including arrangements to minimize any interruption of cable television service to subscribing members of the public; and (b) the results of Defendants' efforts to negotiate a settlement with CCI with respect to CCI's claims for actual consequential damages.

33. In addition, we caution NITCO and Northwest Cable that, having found them in violation of the Act and our rules, we have legal grounds for directing Defendants to show cause why a cease and desist order should not be directed against them prohibiting NITCO from any further construction of cable television distribution facilities and any further

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[53] Defendants have been on notice that their actions might contravene the Commission's telephone/cable television company cross-ownership rules and that they might be required to divest themselves of the subject cable television system distribution facilities. *See* para. 24, *supra*. Defendants thus proceeded at their peril and cannot now be heard to complain should the divestiture ordered herein be required to preserve the integrity of the statutory scheme, including Section 613(b) of the Cable Communications Policy Act of 1984, and Commission policy decisions and rules. *Cf., Lake Telephone Co.*, 41 FCC 2d 335, 338-39 (1973), and *Fort Mill Telephone Co.*, 25 FCC 2d 748, 752-53 (1970), where we conditioned the grant of temporary authority to continue certain telephone company operations upon their divesting themselves of all interests in cable television service to the viewing public within their service areas.

[54] Such prohibited affiliations include, but are not limited to, the financial guarantees, consulting agreement, and leases referred to in paras. 14-18, *supra*.

leasing of pole space to Northwest Cable for operation of cable television distribution facilities in Hebron, DeMotte, and Lakes of the Four Seasons without prior Commission authorization.[55] We will not hesitate to do so should Defendants undertake any additional unlawful construction or commence commercial cable television service to subscribers in Hebron, DeMotte, or Lakes of the Four Seasons who are not currently receiving such service. Further, we are also referring this matter to the Department of Justice under Sections 401 and 502 of the Communications Act for whatever action it may deem appropriate.

34. Accordingly, IT IS ORDERED, That, pursuant to Sections 4(i), 4(j), 202(a), 208, 214(a), 314 and 411(a) of the Communications Act, 47 U.S.C. §154(i), 154(j), 202(a), 208, 214(a), 314 and 411(a), Defendants' motion to dismiss the complaint in this proceeding IS DENIED;

35. IT IS FURTHER ORDERED, That Defendants' motion for leave to file a response to the reply to their amended answers IS GRANTED;

36. IT IS FURTHER ORDERED, That Northwestern Indiana Telephone Company, Inc. SHALL TERMINATE any affiliation with Northwest Indiana CATV, Inc. prohibited by Section 63.54 of the Commission's Rules, 47 C.F.R. §63.54, AND DIVEST any facilities prohibited by Section 63.54 by no later than six (6) months from the release of this Order, unless the Commission has granted appropriate waivers of Section 63.54 of its rules prior to that time;

37. IT IS FURTHER ORDERED, That, no later than 40 days from the release of this order, Defendants SHALL MAKE the filing specified in paragraph 31 herein;

38. IT IS FURTHER ORDERED, That complainant's claims for attorney fees and punitive damages ARE DENIED;

39. IT IS FURTHER ORDERED, That the parties SHALL UNDERTAKE good faith efforts to negotiate a settlement of complainant's claims for damages;

40. IT IS FURTHER ORDERED, That the Chief, Common Carrier Bureau, will determine what further actions, if any, should be initiated should the parties report that they have been unable to resolve the damage claims herein;

41. IT IS FURTHER ORDERED, That the complaint of Comark Cable Fund III, d/b/a CCI Cablevision, IS GRANTED to the extent indicated herein, and otherwise IS DENIED.

42. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), and Section 1.80 of the Commission's Rules and Regulations, 47 C.F.R. §1.80, That

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[55] *Cf. Ashtabula Cable Tv, Inc.*, 17 FCC 2d 113, *recon. denied*, 18 FCC 2d 193 (1969); *Lake Telephone Co.*, 41 FCC 2d 335 (1973); *Fort Mill Telephone Company*, 25 FCC 2d 748 (1970), *temporary authority extended*, 31 FCC 2d 867 (1971).

Northwestern Indiana Telephone Company, Inc. IS HEREBY NOTIFIED of an Apparent Liability for Forfeiture in the amount of $20,000 for its willful and repeated violations of Section 63.54 of our Rules by furnishing pole space and other rental arrangements within its telephone service area to Northwest Cable without authorization pursuant to 47 C.F.R. §63.56(a) to engage in such activities; and for its willful and repeated violations of 47 U.S.C. §214(a) by constructing distribution facilities for cable television systems in Hebron, DeMotte, and Lakes of the Four Seasons, Indiana without the requisite prior authorization of the Commission having been obtained.

43. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3), That NITCO shall, within thirty (30) days of the release of this notice, pay the full amount of the forfeiture in the manner provided for in Section 1.80(h) of the Rules or shall file a response showing why a forfeiture should not be imposed or should be reduced.[56]

44. IT IS FURTHER ORDERED, That the Secretary shall send by certified mail a copy of this Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture to Defendants' counsel, David L. Nace, Esq., David L. Nace & Associates, One Thomas Circle, Washington, D.C. 20005.

45. IT IS FURTHER ORDERED, pursuant to Sections 401 and 502 of the Communications Act, 47 U.S.C. §§401 and 502, That the General Counsel shall refer this matter to the Department of Justice for whatever action it may deem appropriate.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[56] Such a forfeiture amount should be booked to account 370, "Extraordinary income charges", which is a below-the-line account. 47 C.F.R. §31.370. NITCO's annual operating revenue for the years 1981 through 1983 was in excess of $250,000. *See* annual reports of NITCO filed with the Indiana Public Service Commission, Exhibits 15-17 of NITCO's amended answer. Accordingly, NITCO is a Class A telephone company for accounting purposes. *See* 47 C.F.R. §31.01(a).

CATV Program Exclusivity, Network Programming
CATV Special Relief
Rules, Waiver of

Request for waiver of Section 76.92 of the Commission's Rules granted. Petitioner demonstrated projected audience loss to station would not adversely impact licensee's ability to operate in the public interest.

Community Tele-Communications Inc.

FCC 85-316

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re:	
Community Tele-Communications, Inc. d/b/a Scotts Bluff Cable TV	CSR-2116
Petition for Special Relief	

MEMORANDUM OPINION AND ORDER

Adopted: June 18, 1985; Released: June 21, 1985

BY THE COMMISSION: COMMISSIONER QUELLO DISSENTING; COMMISSIONER DAWSON CONCURRING IN THE RESULT.

Introduction

1. Duhamel Broadcasting Enterprises, Inc. (hereinafter "KDUH-TV"), licensee of Station KDUH-TV (ABC, Channel 4), Scottsbluff, Nebraska,[1] supported by the National Association of Broadcasters (hereinafter "NAB"), pursuant to our decision in *Community Tele-Communications, Inc. d/b/a Scotts Bluff Cable TV* (Scottsbluff, Nebraska), 95 FCC 2d 239 (1983), has filed further opposition to the "Petition for Special Relief" filed April 13, 1982, by Community Tele-Communications, Inc. d/b/a Scotts Bluff Cable TV (hereinafter "TCI"), operator of a cable television system serving Scottsbluff, Nebraska, and neighboring communities. TCI has replied, and both TCI and KDUH-TV have supplemented their filings.

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[1] Formerly, KDUH-TV obtained programming from both the NBC and ABC networks. However, in June 1984, KDUH-TV became a full ABC network affiliate. *See* paragraph 6, *infra.*

2. TCI's petition seeks a waiver of Section 76.92 of the Commission's Rules. Absent the requested waiver, TCI would have to honor the request made of it by KDUH-TV to delete the duplicating network programming of Station KCNC-TV (NBC, Channel 4), Denver, Colorado,[2] carried on TCI's system. TCI's petition was opposed by KDUH-TV, though not by NAB. In *Community Tele-Communications, Inc., supra,* the Commission found "that grant of the waiver requested by TCI will not impair KDUH-TV's ability to operate in the public interest." *Id.* at 247. TCI's analysis, however, examined impact based on a grant of a waiver to TCI alone; it was a Commission staff analysis which projected market-wide impact to be only 3.24% on KDUH-TV audience, and 2.1% - 2.4% on the station's revenues. Accordingly, the Commission afforded interested parties an opportunity to comment on the staff analysis, to which comments or oppositions TCI could reply. KDUH-TV and NAB filed their oppositions on December 13, 1983, and TCI replied on February 13, 1984.

Summary of Pleadings

3. KDUH-TV argues that TCI has presented no evidence of harm to it were it to comply with the rules, and that grant of a waiver would clearly impact KDUH-TV adversely. KDUH-TV contends that the purpose of the nonduplication rules is to preserve local television broadcast service, a purpose particularly important in the instant case, given Scottsbluff's small market size — approximately 5,000 households — and KDUH-TV's daily local news and public affairs programming. KDUH-TV claims that its viability is jeopardized by the absence of nonduplication protection, stating most recently that it lost $2,279 in 1981; $156,929 in 1982; and projected a $117,900 loss in 1983. The addition of KCNC-TV's audience, asserts KDUH-TV, would more than double KDUH-TV's Scotts Bluff cable audience. This would aid KDUH-TV in competing with Television Broadcast Station KSTF (CBS, Channel 10), Scottsbluff, Nebraska, which is receiving nonduplication protection. This fact affects local advertisers' decisions, claims KDUH-TV, submitting a letter from one local advertiser. In addition, KDUH-TV argues that the Commission's staff analysis did not account for the fact that KDUH-TV is not receiving nonduplication protection.[3] Taking this fact into account, states KDUH-TV, which

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[2] This station's call letters formerly were KOA-TV. KDUH-TV has not received nonduplication protection for over ten years. *See* note 3, *infra.*

[3] KDUH-TV was entitled to receive nonduplication protection on TCI's system under Commission rules in effect until May 23, 1975, based on the station's signal contour. KDUH-TV requested nonduplication protection from TCI, which honored the request. However, in the *First Report and Order in Docket No. 19995,* 52 FCC 2d 519 (1975), the Commission modified its rules to make nonduplication protection dependent upon fixed mileage zones. Scottsbluff is not encompassed by the Hay Springs, Nebraska specified zone, to which KDUH-TV was originally licensed, and TCI ceased providing nonduplica-

submits an impact analysis performed by Glassman-Oliver Economic Consultants, Inc. (hereinafter "GOEC"), grant of the requested waiver can be expected to have an impact on the station of a 7.9% all-day audience diversion, and 8.3% in prime time — or 5.9% and 6.2%, respectively, of revenues — which translates into a 59% increase in the station's operating losses, and nearly a 300% increase over the Commission's estimates. KDUH-TV challenges the Commission's assumption that, without nonduplication protection, only half of the affected cable viewers choose to watch KCNC-TV instead of KDUH-TV, stating that KCNC-TV's prime time share in Scotts Bluff County is 16%, whereas KDUH-TV's share is only 11%. KDUH-TV further asserts that loss of viewers during an "expanded prime time" — 6 pm to 11 pm — is of even greater importance to the station, and that this period contains 47% of the programming for which protection is requested. KDUH-TV maintains that the Commission's analysis is also flawed in that it examines only audience and revenue loss, and it fails to examine impact on a station's profitability. Indeed, claims KDUB-TV, the Commission's formula in a worst-case scenario would estimate only a 12.3% audience diversion, while according to the GOEC study, an actual worst-case scenario estimate for KDUH-TV would be "up to 67% of the maximum possible [audience diversion]." KDUH-TV argues that its factual situation — the present lack of nonduplication protection — is not reflected by the Commission's formula, and that it should be TCI's burden to justify the waiver *de novo.*

4. In support of KDUH-TV's further opposition, NAB asserts that TCI's petition has been afforded disparate treatment by the Commission, causing "a UHF [*sic*] station providing locally produced, community oriented programming to [its community of license]" to suffer. NAB contends that impact is not adequately measured by the Commission's analysis, which, according to NAB, does not take into account the peculiar harm a station may suffer from the loss of cable viewers.

5. In reply, TCI argues that KDUH-TV makes only general claims and has not submitted a specific showing concerning the station's financial condition and the adverse effect a waiver would have on the public interest in light of the station's condition, as requested by the Commission, citing *Community Tele-Communications, Inc.*, 95 FCC 2d at 246 n. 13. TCI contends that KDUH-TV's analysis presumes that, given protection, the station will gain every cable viewer of KCNC-TV. However, states TCI, Arbitron data shows that KDUH-TV's all-day share in

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tion protection to KDUH-TV in early 1975. When KDUH-TV's city of license was changed to Scottsbluff, the station made its request for protection of TCI. *See Community Tele-Communications, Inc.*, 95 FCC 2d at 241. KSTF, however, has always received nonduplication protection because it has operated as a Scottsbluff station since it was first licensed.

Scottsbluff and Torrington is less than KCNC-TV's, indicating that KDUH-TV, which remains a satellite of Station KOTA-TV (NBC, Channel 3), Rapid City, South Dakota, is just not as popular as is KCNC-TV. TCI also argues that KDUH-TV provides no support for its evaluation of the relative importance of prime time, or for its claim that 62% of the station's revenues are generated therein, as claimed by the GOEC study, and the cable operator maintains that the Commission's analysis is properly applied to KDUH-TV. TCI suggests that KDUH-TV's advertising time's being sold in combination with KOTA-TV's is likely of relevance in advertisers' decisions. TCI further contends that KDUH-TV does not indicate whether its references to revenues and losses are for it alone; for the entire parent company; or for KOTA-TV, KDUH-TV, and two other KOTA-TV satellites together, rendering the information supplied meaningless, and underscoring the correctness of the Commission's use of revenues rather than of profits. Given KDUH-TV's satellite status, states TCI, citing *Amaturo Group, Inc.* (Topeka, Kansas), 68 FCC 2d 899 (1978), the station likely originates locally only about 7 hours per week of programming, and the station has not shown that it cannot continue to provide such programming.

6. On July 2, 1984, TCI filed a letter stating that it received a letter from KDUH-TV on June 19, 1984, indicating that the station was to become an ABC affiliate on June 24, 1984. TCI contends that this network affiliation change should have no effect on the Commission's prior determination. On August 1, 1984, KDUH-TV filed a letter, in which it stated that any differences in viewership attributable to such change "are too insignificant and trivial to prevent the Commission from deciding the case . . . based on the facts before it."[4]

Discussion

7. As we stated in our previous decision,

> [a] waiver of the Commission's network nonduplication rules may ordinarily only be granted upon the submission of specific evidence demonstrating adverse economic impact on the affected cable system as a consequence of compliance or, conversely, demonstrating by a similarly specific factual showing that a waiver will not adversely impact the broadcaster seeking protection. *See Texas Community Antennas, Inc. d/b/a Nacogdoches Cable TV* (Nacogdoches, Texas), 68 FCC 2d 1271, 1279-80 (1978).

Community Tele-Communications, Inc., 95 FCC 2d at 245-246 (footnote omitted). *See also, e.g., Manhattan Cable TV Service, Inc.* (Manhattan, Kansas), 95 FCC 2d 337, 345 (1983). We have already found, based on an analysis of impact evidence, that KDUH-TV's ability to operate in the public interest will not be impaired by grant of TCI's requested waiver. *Community Tele-Communications, Inc.*, 95 FCC 2d at 247. For reasons stated therein, we felt it appropriate in this one case to allow for a further round of pleadings. *Cf. Manhattan Cable TV Service, Inc.*, 95 FCC 2d 345-346 (incremental two-step waiver process inefficient and generally unnecessary). We also stated that

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[4] In view of the parties' desire to resolve this matter, and because the affiliation change does not change the result herein, *see* paragraph 10, *infra*, we are proceeding to a decision on the merits.

> [a] station believing that the use of the formula does not accurately reflect its position would be expected to submit in its pleadings a specific showing (1) as to the station's financial condition, and (2) that the anticipated losses of revenue would adversely affect the public interest in light of the station's condition.

Community Tele-Communications, Inc., 95 FCC 2d at 246 n. 13 (citation omitted). *See also, e.g., Manhattan Cable TV Service, Inc*, 95 FCC 2d at 346. KDUH-TV's further opposition attempts to make such a showing.[5]

8. KDUH-TV's further opposition generally criticizes the Commission's analysis for failing to take into account KDUH-TV's current lack of protection. Therefore, the question which must be addressed is whether the difference between KDUH-TV's current audience and what it would expect, if protection against KCNC-TV were provided, has any impact on KDUH-TV's viability and ability to serve the public. The appropriate analysis would be a variation on the Commission's formula used to show the impact of losing existing protection. In this case, we assume that those watching the simultaneous network programming on KCNC-TV would choose to watch that same programming on KDUH-TV if KCNC-TV were blacked out, rather than switch to some other TV fare. In other words, with nonduplication protection, KDUH-TV would get its current audience share plus that of KCNC-TV for those time periods when this programming is broadcast. The diversion due to duplication is a known factor, as both signals are now available. It is that audience which currently views KCNC-TV. However, even after revising our analysis to take this into account, we see no reason to depart from our prior finding. A market-wide analysis reveals that grant of the requested waiver would have an impact (in terms of a gain) on KDUH-TV's audience of only 3.57%, and on the

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[5] In view of our previous finding, and taking into account the discussion in paragraph 8, *supra*, we disagree with KDUH-TV's contention that TCT must now justify its waiver request *de novo*.

station's revenues of no more than 2.68%.[6] Again, we must conclude from the foregoing that grant of the waiver requested by TCI will not impair KDUH-TV's ability to operate in the public interest.

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[6] The following is a revised staff analysis using the latest available data and the Commission's audience impact formula, which is:

$$\frac{A \times B \times C \times D \times E}{F} = \text{Audience Diversion}$$

Where

A = The number of affected cable subscribers from the 1984 *Cable & Stations Coverage Atlas* and *Television Factbook*, Services Volume No. 51;

B = Cheyenne, Wyoming, market Area of Dominant Influence (ADI) rating from Arbitron's *Daypart Summary*, February 1983 = 35%;

C = Combined KDUH-TV and KCNC-TV average all day share of viewing in cable households in each country where an affected system is located from Arbitron's *county Coverage Surveys*, 1983, Cable-Controlled, when available;

D = An estimate of the percentage of KDUH-TV's broadcast week which would be affected by the loss of nonduplication protection. Exhibit A in the petition shows sample requests for nonduplication protection. At most, KDUH-TV is requesting 55 hours of protection out of a broadcast week of approximately 141 hours, which represents 39% of KDUH-TV's broadcast week;

E = A fractionalization factor which represents the percent of households watching NBC programming that choose KCNC-TV over KDUH-TV in the absence of nonduplication protection (*i.e.*, the actual diversion). It is calculated as KCNC-TV's share divided by the combined KDUH plus KCNC-TV share;

F = Estimate of KDUH-TV's average 9 AM to Midnight audience, if protection were given, from Arbitron's *Daypart Summary*, February 1983. This factor is KDUH-TV's reported 5,000 TV households plus the homes lost to KCNC-TV, as calculated in the numerator of the formula. The 5,000 figure is determined by subtracting the audience listed for KOTA-TV and its two 100% satellites from the audience for KOTA-TV and all three of its satellites under the Rapid City market listing.

9. KDUH-TV's specific criticisms of the factors used in our analysis are equally unavailing. The principal criticism raised by KDUH-TV through the GOEC study is that prime time is not properly emphasized. The GOEC study weights those hours of duplicating programming which occur during prime time as twice the other hours of duplicative programming, citing *Garryowen Corporation* (Great Falls, Montana), 70 FCC 2d 2336 (1979),[7] and proposes to estimate impact by limiting calculations to prime time, alleging without documentation that 62% of KDUH-TV's revenues are derived from that daypart. However, our concern has always been with overall impact and its effect on the overall viability of a station and, therefore, we have consistently rejected this type of limited analysis. *See, e.g., KDUB-TV, Inc.* (Dubuque, Iowa), 88 FCC 2d 450, 459-460 n. 14 (1981), *recon. denied*, 88 FCC 2d 994 (1982); *Waterbury Community Antenna, Inc.*, 84 FCC 2d 143, 148 (1980), *recon. denied*, 85 FCC 2d 1049 (1981); *Teleprompter of Quincy*, 83 FCC 2d 431, 438 (1980). As the all day statistics are themselves weighted averages, they take into account the fact that the viewing levels vary throughout the day. KDUH-TV further criticizes our analysis for failing to estimate the expected loss in terms of profits, instead of revenues. Unless the parties involved supply actual financial data, however, the Commission is forced to rely on its experience for its estimates of the impact of an action on a station's viability. From

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The expected audience diversion is then calculated by system follows:

Scottsbluff	$7{,}331 \times .35 \times .20 \times .39 \times (5/20)$	=	50
Alliance*	$2{,}939 \times .35 \times .32 \times .39 \times .50$	=	64
Kimball*	$1{,}307 \times .35 \times .30 \times .39 \times .50$	=	27
Torrington	$2{,}322 \times .35 \times .25 \times .39 \times (14/25)$	=	44
			185

$$\text{Audience diversion} = \frac{185}{5{,}000 + 185} = 3.57\%$$

The Commission has used factors of 65% and 75% to estimate revenue loss, on the basis of estimated audience loss, in the absence of actual financial data. Applying these factors to the calculations above gives:

$$\text{Audience diversion} \times 65\% = 3.57\% \times .65 = 2.32\%$$

or

$$\text{Audience diversion} \times 75\% = 3.57\% \times .75 = 2.68\%$$

* Cable-Controlled data are not available. In order to maximize the calculations, the diversion factor is assumed to be 50%. It should be noted that for all homes in Box Butte County (Alliance), KCNC-TV attains a 2 share vs. KDUH-TV's 30 share. In Kimball, KDUH-TV's share is 23 and KCNC-TV's is 7. Arbitron indicated that there is 100% cable penetration in Kimball County, meaning that these total household statistics actually represent viewing in cable homes.

[7] The GOEC study thus obtains a figure of 58% for factor D of the formula in note 5, *supra*.

our experience, with actual data and information provided by others, we believe the 65% and 75% factors used to equate audience loss with revenue loss are reliable indicators. The Commission has consistently used estimates of revenue loss, rather than losses in profitability, because we know there is a direct relationship between audience and revenues. The relationship between audience and profits, or revenues and profits, is not as clear. Expenses, which are subtracted from revenues to give profits, are highly variable and depend on a multitude of management decisions and other factors. There is no way the Commission can determine an appropriate level of profitability from a given amount of revenues. Therefore, in the absence of actual data, we choose not to carry the analysis beyond the revenue stage. KDUH-TV is in a position to provide us with its financial statements, if it believes this will make its case. The station has chosen not to do so. Accordingly, we can find no connection between KDUH-TV's lack of nonduplication protection and its current financial state after ten years without protection. With regard to opponents' remaining arguments, we note that KDUH-TV's submission of a letter from a single advertiser is far from probative or conclusive as to revenue loss. *See, e.g., KDUB-TV, Inc.*, 88 FCC 2d at 462. *Cf. KDUB-TV, Inc.* (Dubuque, Iowa), 85 FCC 2d 572, 581 (1981) (mere loss of a single programmer not justification for relief). Nor is KDUH-TV's satellite status particularly relevant to our determination herein. In addition, NAB's generalized assertion that the loss of cable viewers may be particularly harmful to a station does not provide us with any specific factual data probative of the impact, if any, on KDUH-TV.

10. Turning finally to TCI's and to KDUH-TV's filings concerning the latter's affiliation with the ABC network, we note that this changes the station from whose duplicative programming KDUH-TV seeks protection from KCNC-TV to Station KUSA-TV (ABC, Channel 9), Denver, Colorado.[8] However, it is not possible to perform comparable analysis in these changed circumstances because no county coverage data are available from surveys following KDUH-TV's change of affiliation. The only audience data collected since that change were the November 1984 sweeps. These data are only available on an ADI basis. The following tables show the ADI audience shares for the three stations for both the 9 AM to Midnight daypart and the prime time period for both November 1983 and November 1984.

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[8] This station's call letters formerly were KBTV.

Station	*November 1983*	*November 1984*
	9 AM to Midnight	
KDUH-TV	10	10
KCNC-TV	13	15
KUSA-TV	17	14
	Prime Time	
KDUH-TV	10	10
KCNC-TV	13	15
KUSA-TV	17	14

From the above data, it can be noted that there is no difference in KDUH-TV's audience share on an ADI basis even though its affiliation has changed. Also KCNC-TV, the station which formerly duplicated KDUH-TV, has gained audience of approximately the same magnitude as the loss experienced by KUSA-TV, which is now duplicative of KDUH-TV. Since the ADI consists of more than just Scotts Bluff County, there is no way of knowing whether the affiliation shift caused these shifts in audience. However, the similarity of the numbers suggests that the initial analysis may still provide reasonable estimates of the audience which KDUH-TV is losing in the absence of network nonduplication protection. In view of this, we agree with TCI's and KDUH-TV's shared contention that we can proceed to a decision today based on the facts before us.

11. In view of the foregoing, we find that grant of the waiver requested by TCI is in the public interest.

12. Accordingly, IT IS ORDERED, That the "Petition for Special Relief" (CSR-2116) filed April 13, 1982, by Community Tele-Communications, Inc. d/b/a Scotts Bluff Cable TV IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Common Carrier, Authorization
Common Carrier, International
Common Carrier, Rates, Charges
Competition, Common Carriers
International Carriers, Tariffs

Notice of Proposed Rulemaking adopted regarding policy and rules concerning rates and facilities authorizations for international competitive common carriers.

Competitive Carrier Policies
CC Docket 85-107

FCC 85-177

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of International Competitive Carrier Policies	CC Docket No. 85-107

NOTICE OF PROPOSED RULEMAKING

Adopted: April 11, 1985; Released: April 19, 1985

BY THE COMMISSION:

I. Introduction

1. Over the last several years the international telecommunications marketplace has undergone dramatic change. The rigid carrier and service dichotomies which limited carriers' operations and offerings have been abandoned in favor of a more competitive marketplace.The elimination of these restrictive policies and technological developments have led to the entry of a variety of new carriers in the international market including The Western Union Telegraph Company (Western Union), International Relay Inc. (IRI), Satellite Business Systems (SBS), MCI and GTE Sprint as well as a number of resellers and enhanced service providers offering a range of varying international services.[1] We also

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[1] Resellers use IMTS to provide telex-like and other record services. Enhanced service providers offer transmission services which are in some way processed by computer. We determined that enhanced service providers are not subject to Title II regulation in our *Computer II Rulemaking. See,* In The Matter of GTE Telenet Communications Corp.,

expect that our recent *Authorized User*[2] and *Earth Station Ownership*[3] decisions will further spur expansion in the number of service providers. In addition, we presently have under consideration private fiber optic cable and satellite system proposals. In light of the many developments we have seen over the last several years, we believe it is time to review the efficacy of tariff and facility licensing practices as they apply to international common carrier service providers.

2. We tentatively propose to reduce our international common carrier tariff and facility authorization regulations by streamlining the procedures that non-dominant carriers must follow. In addition, we are asking affected carriers, interested parties and the public to comment on the benefits of reducing regulation for non-dominant carriers as well as on our proposed findings. We also seek comment on the extent to which differences in the international market should be reflected in the extension of our competitive carrier policies to that market. In particular, would competition among U.S. international carriers be sufficient to make the international telecommunications market competitive given the presence of foreign PTT's in the provision of all international telecommunications services? Below we briefly examine the history of the our *Competitive Carrier Rulemaking*[4] in the domestic market which has greatly reduced regulatory requirements for domestic carriers without market power. We also examine the legal authority for reducing regulation for such carriers. We then look at international services and classify them into market groupings to determine the dominance or non-dominance of

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FCC 85-29, released February 22, 1985. In addition, there are refilers and others that use IMTS for their own private, non-IMTS use.

[2] Proposed Modification of the Commission's Authorized User Policy Concerning Access to the International Satellite Service of the Communications Satellite Corporation, FCC 84-633, 100 FCC 2d 177, released January 11, 1985, 50 Fed Reg 2552 (January 17, 1985) [Authorized User II].

[3] Modification of Policy on Ownership and Operation of U.S. Earth Stations that Operate with the INTELSAT Global Communications Satellite System, FCC 84-605, 100 FCC 2d 250, released December 18, 1984.

[4] Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services (CC Docket No. 79-252), Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Report and Order, 91 FCC 2d 59 (1982), *recon.* FCC No.83-69, released March 21, 1983; Second Further Notice of Proposed Rulemaking, FCC No. 82-187, released April 21, 1982; Third Further Notice of Proposed Rulemaking, Mimeo No. 33547, released June 14, 1983, 48 Fed. Reg. 28,292 (June 21, 1983); Third Report and Order, Mimeo No. 012, released October 6, 1983, 48 Fed. Reg. 46,791 (October 15, 1983); Fourth Report and Order, 95 FCC 2d 554 (1983); Fourth Further Notice of Proposed Rulemaking, FCC No. 84-82, released March 22, 1984, 49 Fed. Reg. 11,856 (March 28, 1984); Fifth Report and Order, FCC No. 84-394, released August 27, 1984, 49 Fed. Reg. 34824, September 4, 1984; Sixth Report and Order, FCC No. 84-566, released January 4, 1985, 50 Fed. Reg. 1215 (January 10, 1985).

the service providers' various offerings. Finally we discuss the changes in the tariff and facilities licensing requirements that we are proposing for those firms found to be non-dominant.

II. Background

A. Domestic History

3. The actions we now proposed are not being drawn on a clean slate. Our *Competitive Carrier Rulemaking* proceeding greatly modified the applicability of our tariff and licensing practices as they apply to certain providers of domestic interstate common carrier telecommunications services. We initiated the *Competitive Carrier* proceeding in 1979 in the aftermath of a number of Commission decisions which permitted entry into the domestic market by new service providers.[5] This docket began the process of eliminating unnecessary regulatory burdens applicable to service providers operating in the domestic interstate service market. The foundation in *Competitive Carrier* was our finding that, in a competitive environment, market forces could provide the public the statutorily mandated protection against unreasonably high rates and undue discrimination. That is, marketplace forces could replace regulation and make unnecessary burdensome regulatory requirements for both carriers and the Commission.

4. The *First Report and Order* implemented our policy objectives of limiting unnecessary regulatory burdens in a limited segment of the marketplace. There, we analyzed carriers' market power and classified those carriers with market power and the ability to exercise that power as dominant while carriers without market power were classified as non-dominant. Carriers which we found to be dominant remained subject to the full panoply of regulatory tools because market forces could not be expected to exert the necessary restraint on carrier facility decisions and pricing practices. We found, however, that non-dominant carriers did not have market power or the ability to set price and, therefore, we streamlined the regulation of these carriers.[6] In the *First Report and Order*, we found AT&T and the independent telephone companies to be dominant. Due to certain transitional factors like facility shortages

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[5] These decisions include MCI, 118 FCC 2d 953 (1969), *recon. denied*, 21 FCC 2d 190 (1970); Specialized Common Carrier Services, 29 FCC 2d 870 (1971), *recon.* 31 FCC 2d 1106 (1971), *aff'd sub nom.* Washington Utilities and Transportation Commission v. FCC 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975); MCI Telecommunications Corp., 60 FCC 2d 25 (1976), *rev'd* MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (1977) (Execunet); Domestic Satellite Facilities, 35 FCC 2d 844 (1972), *recon.*, 38 FCC 2d 665 (1972); Resale and Shared Use, 60 FCC 2d 261 (1976), *recon.*, 62 FCC 2d 588 (1977), *aff'd sub nom.*, AT&T v. FCC, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 99 S. Ct. 213 (1978); Customer Interconnection, 61 FCC 2d 766 (1976).

[6] 85 FCC 2d at 20.

relative to the demand, we also found Western Union, domestic satellite carriers, resellers and miscellaneous common carriers to be dominant. All other service providers considered in that proceeding were found to be non-dominant.

5. After discussing several theories for further reduction of Title II regulation we settled, in the *Second Report and Order*, on a forbearance approach. Under this approach we forbore from applying certain filing requirements. Specifically, in the *Second Report and Order* we determined that the burdens outweighed the benefits in requiring tariff filings and facilities applications with respect to terrestrial resellers. The *Third Report and Order* extended the scope of the *Competitive Carrier Rulemaking* to include services provided to all domestic points outside the continental United States such as Hawaii, Guam and Puerto Rico.

6. The *Fourth Report and Order* extended forbearance to all domestic resellers and specialized common carriers. In addition, we extended streamlined regulation to all domestic satellite carriers, miscellaneous common carriers and facilities-owning interexchange carriers affiliated with exchange telephone companies. More importantly, the *Fourth Report and Order* clearly developed an analytical framework for applying the competitive carrier policies. This approach, which stresses antitrust law considerations and relies on marketplace regulation in suitable circumstances, will be discussed in Section III.

7. The *Fifth Report and Order* extended forbearance to domestic satellite carriers providing interstate service, miscellaneous common carriers, carriers providing DEMS systems and affiliates of exchange carriers providing interstate, interexchange services. Finally, *The Sixth Report and Order* took a further step by requiring non-dominant carriers to detariff their service offerings. In effect, our five years of experience with the *Competitive Carrier* line of decisions has demonstrated that in the presence of competition, it is possible to lessen or eliminate certain regulatory practices, thereby reducing carrier and Commission costs without harm to the public.

B. Legal Basis For Reducing Regulation

8. The legal basis for what we propose to do here, streamlining Title II facility and tariff requirements for non-dominant carriers, was set forth in great detail in the *First Report & Order*.[7] In administering the Communications Act, 47 U.S.C. §151 *et seq.*, the Commission's goal is to ensure the availability to United States users of "rapid, efficient, nation-wide, and world-wide wire and radio communication services with adequate facilities at reasonable charges . . . ".[8] In order to achieve these goals the Commis-

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[7] 85 FCC 2d at 12-20, 40-44.

[8] 47 U.S.C. §151.

sion has "broad discretion in choosing how to regulate."[9] In regulating in the public interest, competition in the telecommunications industry is clearly a relevant factor.[10] Where we used to rely on regulation to ensure that carriers operated in the public interest, we now rely on the marketplace when possible.[11] A further basis for what we propose is found in the Record Carrier Competition Act of 1981 (RCCA).[12] The RCCA directs the Commission to forbear from exercising its authority as the development of competition among record carriers reduces the degree of regulation necessary to protect the public. We emphasize, however, that our increased reliance on marketplace regulation does not mean that we are abandoning our duties as set forth in the Communications Act. We will retain our power to investigate non-dominant carriers based upon complaints or upon our own initiative to ensure that rates and practices are just and reasonable.

9. Our experience in the domestic *Competitive Carrier* proceeding gives us confidence that when a competitive environment exists the goals of the Communications Act are best satisfied by reducing, to the extent possible, entry, exit and pricing burdens for non-dominant carriers. Less regulation, moreover, allows carriers to better respond to consumer desires at the lowest price on a timely basis.

III. Discussion

10. Changes in the structure and composition of the international component of the U.S. telecommunications industry suggest that the time is ripe to reconsider the usefulness of full fledged rate and facilities regulation. Today, we tentatively conclude that there are adequate reasons for reducing regulation for some international service providers. Specifically, we propose lessening regulation for those carriers that are found to lack market power (*i.e.*, are non-dominant) and whose behavior and conduct are effectively controlled by market forces.[13] As we see it, the carriers we tentatively conclude to be non-dominant need not be burdened with excessive regulation in order to ensure that their charges and practices are just and reasonable or that their facility investment

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[9] *AT&T v. FCC* 572 F.2d 17, 26, *cert. denied*, 439 U.S. 875 (1978).

[10] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Hawaiian Telephone Co. v. FCC*, 589 F.2d 647 (D.C. Cir. 1978).

[11] As the court said in *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1475 (D.C. Cir. 1984), "the public interest touchstone of the Communications Act, beyond question, permits the FCC to allow the marketplace to substitute for direct Commission regulation in appropriate circumstances."

[12] 47 U.S.C. §222(b)(1).

[13] To the extent that behavior and conduct may not be effectively controlled by market forces, we retain the ability to appropriately respond. For example, control of bottleneck facilities by PTTs, which may encourage whipsawing of U.S. carriers, will be countered through the application of our uniform settlements policy.

decisions are warranted. This is consistent with our domestic experience which has shown that the existence of competition permits some carriers to be substantially freed from rate and facility regulation.

11. Any such decision would only be proper after a careful analysis of the particulars of the market, and the degree of market power possessed by service providers. In order to determine the market power of a given firm, we must first define the relevant market.[14] Generally, in antitrust cases and legal and economic literature, a market has two dimensions to it — geographic location and product substitutability. If a product can be shipped from one location to another to prevent a price rise, the relevant geographic market includes both locations. Similarly, if two products are functionally similar, they are both part of the same product market. Among the factors which are used to define the relevant product market are custom and usage patterns, substitutability in production, and substitutability in use.[15] The *Fourth Report and Order* examined service characteristics and geographic scope to define the relevant market in domestic communications.[16] We propose to define the relevant markets for international communications service by examining the same two market dimensions.

A. Product Market

12. A wide variety of telecommunication services are available from a number of firms in the international marketplace. This includes International Message Telecommunication Service (IMTS), telegram, telex, high and low speed data, private line and video.[17] Our definition of the relevant product markets must meet the test established in the *Fourth Report and Order, i.e.*, that services in a single market be substitutable in demand or in supply.[18] The *Fourth Report and Order*, due to interchangeability of use and supply of services, defined domestic interstate telecommunications as a single market.[19] Our analysis of customer usage and carrier ability to provide varying services leads us to conclude tentatively that international telecommunications is markedly different from domestic

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[14] 95 FCC 2d at 502; *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956).

[15] Cross-elasticity of demand can be used to determine substitutability in use. It is a measure of the percentage change in the quantity demanded of one product that results from a percentage change in the price of another product. Direct application and use of this concept in actual cases has been limited due to difficulties in gathering appropriate data as well as difficulties in interpretation of the results. Thus, most cases have relied on practical indicia of this concept such as peculiar characteristics and uses and reasonable interchangeability. *See*, U.S. v. Brown Shoe Co., 370 U.S. 294 (1962).

[16] 95 FCC 2d at 562-63.

[17] IMTS is standard telephone voice service.

[18] 95 FCC 2d at 563-64.

[19] 95 FCC 2d at 573.

telecommunications and consists of two separate and distinct markets—IMTS and non-IMTS.[20]

1. Demand Substitutability

13. Demand substitutability refers to subscriber's ability and willingness to switch among and between various services.[21] The cornerstone of demand substitutability is customer perception of the services in question and includes factors such as service quality, relative prices, availability, and geographic coverage as well as the marketing of the services.

14. In effect, the key aspects of demand substitutability are the interchangeability of use and the relative prices of the services. For example, in the relevant price range, two products which have similar characteristics are said to be substitutes if a rise in the price of product A causes consumers to switch to product B. The smaller the price increase and the larger the consumer switch, the closer substitutes the two services are. A and B are perfect substitutes if a very small increase in the price of A caused all of A's customers to switch to B. Similarly, if A and B are close substitutes then a drop in A's price would cause B's customers to switch to A.

15. IMTS is the major international telecommunications service in terms of revenues (approximately 70%) and circuit requirements (over 80%) and continues to have a healthy growth rate.[22] The major non-IMTS service is telex, a relatively mature low speed data service, which has a declining growth rate.[23] While telex's declining rate of growth may be partially attributable to declining IMTS prices, we believe that there are other significant factors influencing its slower growth. These factors include the rapid expansion of high speed data, facsimile, private line and other services. Also, as telex is almost exclusively a business service, one would expect the recent world economic downturn to have depressed its growth.

16. Empirical analysis suggests that demand for IMTS is not greatly influenced by the rates of other services and vice versa. Our own review of relative usage and rate fluctuations also indicates that demand for

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[20] Historically, the international telecommunications service market has been divided into two broad product groupings - voice and record. For the most part, AT&T provided IMTS and the international record carriers provided a variety of record services. Even though now permitted to provide any service on the U.S. end, a variety of factors, especially the need to obtain the agreement of a foreign correspondent before offering any service to a particular foreign point, continues to restrict international carriers' freedom to provide any service to any foreign point.

[21] 84 FCC 2d at 501; 351 U.S. at 404; II Areeda & Turner, Antitrust Law 370 (1978) (Areeda & Turner).

[22] From 1980 to 1983 IMTS has experienced a yearly growth rate ranging from 39.7% in 1981 to 18.5% in 1983.

[23] The growth in telex traffic has slowed from 15.2% in 1980 to 6.3% in 1983.

IMTS and non-IMTS services seems to be relatively unaffected by the cost of the other service. For example, despite declines of 50% and more in international telephone rates and stable telex rates over the last few years the number of telex messages has continued to increase.[24] If IMTS and telex were substitutable then an increase in telex demand would not be expected in light of the changing IMTS-telex price relationship. On the contrary, we would expect telex demand to decline as these customers shifted their use to IMTS.

17. A study by Rea and Lage found that changes in telex rates do not affect IMTS demand, that IMTS prices are not related to the demand for telex service and that telegraph rates are inversely related to IMTS demand.[25] While the results of this study are not conclusive, they suggest that high rates for voice service will not lead IMTS users to shift to record services. Similarly, the study seems to indicate that high rates for record services (or lower charges for voice services) will not cause a shift to IMTS.

18. Thus, the data tend to show that, unlike the domestic market, IMTS and various non-IMTS services are not substitutes in the international communications market. A number of factors support this conclusion. Foremost are the language and significant time zone differences which exist in the international marketplace. It is much less useful, for example, to make a telephone call to a nation in which a foreign language is spoken since the caller and recipient must share a common language in order to communicate effectively. Also, in many instances the nation being called is six or more hours ahead or behind U.S. time so that business hours barely overlap if they do at all.[26]

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[24] For example, from 1980 to 1983 the price of peak period IMTS Direct Dial to the United Kingdom dropped from $4.80 for the first minute and $1.60 for additional minutes to $2.08 and $1.26 respectively. Telex rates to the United Kingdom have only dropped from $1.43 to $1.41 over the same time period. During that time the number of telex messages to the United Kingdom increased from 7,254,783 to 8,974,061. IMTS and telex rates and traffic for other countries have shown similar trends.

[25] Rea, John D. and Gerald M. Lage, "Estimates of Demand Elasticities for International Telecommunications Services," *The Journal of Industrial Economics* 363-381 (June 1978). The study presents estimates of demand elasticities for telecommunications services that originate in the United States. Data for 37 major routes were combined for the 1964-1973 period to estimate the elasticities. Separate equations were postulated for telephone, telegraph and telex. The independent variables that are included in the equations are price indices for telephone, telegraph, and telex messages; international trade between the United States and the foreign countries in the sample; and nominal household disposable income. Two statistical models are used, the covariance model and the error components model.

[26] We note that because of more significant language and time zone differences a higher percentage of traffic between the United States and the Pacific Basin is non-IMTS than between the United States and Europe.

19. These international marketplace realities have a greater impact on the use of IMTS as opposed to the use of other telecommunications services and lead us to conclude that IMTS and non-IMTS services are not substitutable. For example, a service like telex which produces a hard copy, can be translated, can provide a record of the communication, and can be sent regardless of the time in the receiving country. Likewise, other non-IMTS services, such as high speed data and video can also be transmitted without regard to time or language. Indeed, telex and other non-IMTS services are the preferred way of handling international business transactions because non-voice information can be transmitted without regard to time or language and can be processed by computers immediately or stored for later use. Also, whereas non-IMTS services are used almost exclusively by business customers, a substantial proportion of IMTS users are residential customers. For residential users IMTS and non-IMTS services are even weaker substitutes than they are for business customers.

20. We view various non-IMTS services such as telex, high speed data, and private line as generally substitutable for each other.[27] For the most part, all of these services are used for transmitting data and other information of a business nature. In addition, all of these services are generally used without regard to language and time zone differences between countries. Thus, based on factors such as price and speed requirements customers are able to use these services interchangeably. Some evidence of this may be found by examining growth trends for the various non-IMTS services. For example, while yearly growth of telex traffic slowed from 15.2% to 6.3% and yearly growth of telex revenue slowed from 8.0% to 3.9% from 1980 to 1983, private line revenues grew at an increasing pace over the same period up from 3.8% in 1980 to 11.7% in 1983.[28] Growth in the number of circuits used for private line service has shown similar growth with the number of private line circuits worldwide increasing from 1497 in 1980 to 2216 in 1983. Thus, we believe that customers view various non-IMTS services as generally substitutable with each other but not with IMTS.

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[27] There may be a number of limited services such as television transmission service that are not highly substitutable with other non-IMTS services from the customer's point of view. They are, however, substitutable on the supply side and properly placed in the non-IMTS market.

[28] While there may be some substitutability between IMTS and private line services, we believe that the usage and pricing of private line services indicates that there is a greater substitutability between private line services and non-IMTS than between private line services and IMTS.

2. *Supply Substitutability*

21. As we have indicated, market definition rests not only upon demand, but supply substitutability as well. We have defined supply substitutability as the ability of a service provider to shift its resources from the manufacture or provision of one product or service to another product or service.[29] Typically, such a shift would be in response to changes in market conditions or in the pursuit of profits that exceed the opportunity costs of capital. Products are said to be substitutable on the supply side if barriers to entry are low so that a firm may easily shift facilities and resources from the provision of one service to the provision of a second service in the short-run.[30]

22. Traditionally, supply substitutability hinges on issues such as the technical and cost obstacles faced in shifting resources from one use to another. Carriers in the domestic market, for example, are generally free to respond to customer demand by redeploying their existing facilities so that almost all services are substitutable from the producer's viewpoint. However, there seem to be substantial non-technological obstacles internationally which impede the alternative use of plant and facilities. An international carrier, for example, must obtain the agreement of a foreign administration in order to provide a specified service to a particular overseas point, to place additional circuits in operation or to provide any new service offerings. An IRC may have an operating agreement to provide specific record services but if it wishes to provide IMTS it must negotiate a new operating agreement with the foreign administration. Thus, while it may be technically possible to convert facilities that are used to provide non-IMTS services to IMTS service, institutional limitations make the conversion more difficult in the international arena than in the domestic arena of communications. This is true both for companies trying to enter a market for the first time as well as established carriers trying to offer new or expanded service.

23. Our experience is that carriers can more easily shift their facilities from the provision of one non-IMTS service to the provision of another non-IMTS service than they can shift non-IMTS facilities to provide IMTS service. Most IRCs' operating agreements reflect the ability to provide a variety of non-IMTS services and it appears to be relatively easy for these carriers to gain approval from foreign governments to alter their operating agreements to provide varying non-IMTS services. At the same

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[29] 95 FCC 2d at 565. *See,* Areeda & Turner at 374.

[30] Barriers to entry are generally technological or economic, for example, a patented process that is unavailable to new entrants or the extremely high capital costs required to enter a given market. Due to the unique nature of international telecommunications, there are also substantial regulatory barriers which confront U.S. service providers on the foreign end.

time it appears more difficult for these carriers to gain the necessary approval to shift their facilities to IMTS use.

24. While a few countries, notably Canada, Australia, Belgium and the United Kingdom are beginning to offer increased opportunities for entry, the global prospects are still limited. Our experience is that it is particularly difficult for the IRCs or new entrants to gain operating agreements for the provision of IMTS.

25. Another factor limiting the degree of supply substitutability for those international carriers with customer requirements for private line cable services stems from the limited number of cable facilities available for the provision of international services. The provision of international services over a few high capacity cable facilities introduces the possibility of a significant time lag in these carriers' ability to respond quickly to a user's demand for additional capacity. Thus, while excess capacity generally exists internationally, it is not impossible that a customer's need for a particular type of facility to a particular overseas point may go unmet until the next transatlantic, transpacific, Caribbean or other cable is introduced. This limitation generally is not present in the domestic market where carriers have greater control over their facilities, facilities are generally less expensive and carriers are better able to switch service offerings or add new facilities to respond quickly and economically to meet customer demand. It is also generally not present in the international satellite arena.

26. The existence of resellers, refilers, and others may be evidence of some limited supply substitutability from IMTS to record and data services. It seems, however, that if there is supply substitutability between the IMTS and non-IMTS markets it presently works in only one direction — from, IMTS to non-IMTS. The use of non-IMTS facilities for the provision of voice service is extremely limited, as reflected in the IRCs' inability to gain a foothold with their Datel services which have been authorized since 1979. Given that total revenues in the IMTS market exceeded $1.7 billion in 1983 and that AT&T, the major provider of IMTS service, has an attractive rate of return[31] as well as the declining profitability of the international record market, logic compels us to conclude that international record service providers would have an incentive to shift their facilities from non-IMTS to IMTS use, and would presumably do so, if such a shift were feasible. We have seen no evidence of this transfer of facilities occurring, however.

27. Thus, in contrast with our demand and supply substitutability analysis of the domestic market which led us to find substantial substitutability and one product market, our analysis of the international market, particularly time zone, language, business practices and the need

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[31] *See infra,* footnote 35.

to obtain operating agreements, appears to support a finding of two products. Accordingly, we tentatively conclude that the international telecommunications marketplace is made up of two products, IMTS and non-IMTS for purposes of this proceeding.

B. International Geographic Market

28. In addition to supply and demand characteristics, markets are defined in terms of their geographic scope. The dimensions of the geographic market are based upon a supplier's ability to provide service to a given area or upon a subscriber's ability to receive service from a supplier in a given area.[32] Domestic carriers, for instance, are able to provide interstate service throughout the United States. Thus, if a price differential unrelated to the quality or cost of the service develops in a particular location, some competitor can enter that market and reduce or eliminate the price differential. Similarly, the existence of several carriers supplying service to a particular geographic market prevents a disparity in prices from developing. Thus, we found that all domestic services operate in a single geographic market.[33]

29. It appears to us that in the international market, due to the need to obtain operating agreements, a carrier cannot freely provide service to a given country merely if it wishes to do so. It is also difficult for a carrier to shift its facilities from serving one country to serving another based upon market conditions. This is due in part to the use of a relatively few cable and satellite facilities which give less flexibility than the broader based domestic facilities. In addition, before reducing or adding facilities, a carrier must obtain the acquiescence of the foreign correspondent in both the country in which facilities are being reduced and in which they are being increased. In light of these substantial restraints which limit the provision of service to a country-by-country basis we tentatively conclude that each country is a separate geographic market. We realize that alternative formulations are possible and, therefore, are interested in commenters' views on our proposed country-by-country geographic market definition. In addition we request comments on the ease with which carriers can enter and exit foreign markets.

C. Market Power

30. Given our tentative findings that each nation constitutes a separate geographic market and that the product markets are defined as IMTS and non-IMTS services, we now consider whether any firm is dominant in a given market. A finding of dominance for any firm would lead us to conclude that the marketplace would not operate to ensure

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[32] 95 FCC 2d 573.

[33] *Id.*

either that it would price its services competitively or employ practices consistent with the Communications Act. Consequently, a finding of dominance would justify the continued application of full Title II regulation.

31. Under traditional antitrust analysis dominance is defined as "the power to control prices or exclude competition."[34] As we discussed earlier, our *Competitive Carrier* decisions found that firms lacking market power do not have the ability to maintain prices unreasonably above or below cost. We also concluded that a firm's ability to price above marginal cost without encountering entry may be evidence of a noncompetitive market. A firm with the ability to maintain prices below marginal costs could drive competitors out of the market and subsequently permit that firm to raise its prices and earn monopoly profits. Firms lacking market power, however, do not have the ability to raise price above the competitive level because other firms would enter and force price down to the competitive level. Thus, we found that a non-dominant firm is effectively regulated by marketplace forces so that the imposition of more than minimal regulation is unnecessary. Rather, our ability to intervene based upon complaints or upon our own initiative is sufficient.

32. While any determination of a carrier's dominance or non-dominance is not scientifically precise, we tentatively conclude that the factors discussed below give an adequate indication of market power. They include market share, control of bottleneck facilities, rate of return as well as the existence of actual or potential competition. Rather than make any single factor central to our analysis, it is necessary to look at them as a whole.[35]

1. The IMTS Market

33. In view of our tentative finding that demand and supply substitutability factors warrant treating IMTS as a separate service, we will now analyze whether any provider of this service is dominant. AT&T is the only IMTS service provider to most countries. In those countries where there are other carriers offering IMTS, AT&T is the overwhelming service provider.[36] In addition, AT&T is the major owner of submarine cables

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[34] 351 U.S. at 391; *Areeda & Turner* at 322.

[35] While we recognize that foreign owned carriers may not have market power, they may, in concert with their parent organizations, distort the market and give rise to questions relating to equal interconnection, discrimination and reciprocity. We also nte the control of facilities and entry by the parent organization. Therefore, we tentatively conclude that foreign owned carriers and should be subject to full tariff and facility regulation. For purposes of this proceeding we would define a foreign owned carrier as any entity that would be unable to hold a station license under §310 of the Communications Act.

[36] MCI and GTE Sprint have recently begun offering IMTS service to selected overseas points. To date their market shares are negligible.

which are one of the two basic means of providing service between the United States and most of the rest of the world. This creates a bottleneck which may make it more difficult and expensive for new firms to enter the market. The existence of satellite facilities is not enough to completely eliminate this bottleneck because intermodal (cable v. satellite) competition is not yet fully developed.[37] Thus, for the IMTS market, we believe that AT&T possesses market power as well as the ability to exercise that power. We therefore tentatively conclude that AT&T is dominant.[38]

34. We also tentatively conclude that in addition to AT&T, certain carriers providing service between domestic, non-contiguous points and foreign points on a monopoly or near monopoly basis also possess market power and should be considered dominant. These points include Hawaii which is served by The Hawaiian Telephone Company; Alaska served by Alascom; Puerto Rico served by All American Cables & Radio; the U.S. Virgin Islands served by ITT-CIVI and Guam served by RCA Globcom.[39] These service providers appear to be in a position similar to AT&T's. While they do not have the same control of facilities, they do seem to have the ability, absent regulation, to raise or lower prices at will as they are the only provider of IMTS service to these points. Thus, we tentatively conclude that they too are dominant and should remain subject to full regulation.

35. We tentatively conclude that all other IMTS carriers are non-dominant for that service. For the most part, these carriers (*e.g.*, MCI, GTE Sprint, SBS) have only recently begun offering IMTS. They have minimal market shares and clearly face competitive pressures given the presence of AT&T in the marketplace. Thus, they cannot raise price above or lower price below marginal costs and remain in business. In this regard, these carriers are analogous to the OCCs which we streamlined and later forbore from regulating in the *Competitive Carrier* decisions because their presence could not dictate operation of the market.

2. The Non-IMTS Market

36. Our proposed findings for the non-IMTS market are that no carrier is dominant in any given geographic market. The primary focus of our

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[37] *See supra*, paragraph 25; Authorized User II at paragraphs 39-40.

[38] Our tentative finding that AT&T possesses market power in the IMTS market is also supported by its reported rates of return of 36% in 1979, 23% in 1978 and 15% in 1977. Data on AT&T's specific IMTS rate of return has not been collected since 1979. However, from available aggregated data it appears that AT&T's rate of return for IMTS since 1979 has exceeded its overall authorized rate of return.

[39] This rulemaking does not affect the provision of service between these noncontiguous domestic points and the continental United States. These services were streamlined in the domestic *Competitive Carrier* proceeding. *See*, Third Report and Order, 48 Fed. Reg. 46,791.

analysis in the non-IMTS market are the IRCs (and Western Union) and their major services — telex and private line services. While there are other firms operating in this market, their market shares are small and they are subject to competition from the IRCs, Western Union and other service providers.

37. Our analysis of the non-IMTS market leads us tentatively to conclude that any IRC or other carrier attempting to price uncompetitively will be met by a variety of forces operating to make such action difficult, if not impossible. Thus, if a carrier attempts to raise prices it will lose customers to other service providers.

38. In all of the major geographic markets there are at least three carriers which split telex traffic between them fairly evenly. For example, in the United Kingdom and West Germany, ITT World Communications Inc., RCA Global Communications, Inc. and Western Union International, Inc. (WUI) each have 22% to 26% of the telex traffic while in Japan they each have 18% to 32% of the telex traffic. Similarly, there are multiple carriers providing private line service in all of the major geographic markets. For example, six carriers provide private line service to the United Kingdom. WUI with 207 out of the 770 private line circuits to the United Kingdom, has the largest share, and AT&T, with 50, has the smallest share. In addition, there are a number of other record carriers such as FTCC, TRT, Western Union, Graphnet, IRI and SBS and resale and enhanced service providers such as CCI and GTE Telenet in these markets.

39. Another factor which supports the proposed finding of non-dominance for all non-IMTS service providers is the practice of regional pricing by the IRCs. Under this type of pricing approach a particular country in which one IRC has a large market share is not priced to reflect this apparent market power. Thus, when one looks at the non-IMTS market as a whole, we believe that no one carrier is dominant with respect to any particular geographic market.[40]

40. Due to AT&T's very limited entry into and small share of the non-IMTS market, we tentatively conclude to classify it as non-dominant in the non-IMTS market. First, AT&T does not provide telex service. Second, the

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[40] There are a number of very small countries such as Albania and the Ascension Islands in which one carrier handles over 50% of the originating (*i.e.*, outbound from the U.S.) telex traffic. These figures, however, do not conclusively prove market power. Market share by itself does not prove dominance. Carriers with large market shares face competition from resellers, refilers and other service providers. Additionally, foreign administrations are very much aware that their total revenues are affected by their U.S. correspondents' collection rates. Therefore, foreign correspondents may inhibit U.S. carriers which appear to have market power from exercising that power. Thus, even if a carrier has a very large market share in one of these small markets, there is no evidence that they have the ability to exercise or have exercised market power.

major non-IMTS service AT&T provides is private line and its provision of this service is on a very small scale. For example, it has only ninety out of a total of 1441.5 private line circuits to all of Europe and fifty of those are to the United Kingdom. Since 1982, when this Commission allowed AT&T to begin non-voice service in the international market, AT&T has achieved a market share of less than 10% in private line. Therefore, we tentatively plan to streamline regulation of AT&T's operations in this market. However, given the disparity of resources between AT&T and other international carriers, we are concerned about the possibility of anticompetitive pricing and therefore invite interested parties to comment on any danger presented by streamlining AT&T's international non-IMTS services.

3. Comsat

41. Comsat's position in the international marketplace is unique and its classification under a competitive carrier approach warrants special attention. Comsat's provision of INTELSAT space segment services through its World Systems Division is presently a monopoly offering. Further, excluding certain transborder satellite transmissions, Comsat is the sole provider of international space segment capacity to U.S. carriers and users. Additionally, we note that Comsat is the sole U.S. investor in INTELSAT, that Comsat has a guaranteed market share under the present traffic loading guidelines, and that intermodal (cable v. satellite) competition is not yet fully developed. In view of all these factors, we tentatively conclude that Comsat's World System Division is dominant for these Title II services. Any Comsat subsidiary providing end-to-end or other competitive services would be classified as non-dominant. The only exception to this non-dominant treatment of Comsat's competitive activities would be Comsat's provision of earth station services other than IBS or television.[41] We tentatively conclude that these earth station services (*i.e.*, earth station services other than IBS and television) should remain subject to full-scale regulation as Comsat apparently will remain the primary earth station service provider at least for the near future since the Earth Station Ownership Consortium (ESOC) is continuing with Comsat being the sole provider of earth station services from ESOC earth stations. Once the structure of the earth station market becomes more clear we will consider applying *Competitive Carrier* to Comsat's remaining earth station offerings as well.

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[41] We intend to monitor the competitive development of the provision of IBS and television earth station services over the next several months to determine whether this tentative conclusion accurately reflects the realities of the marketplace.

IV. Implementation of International Competitive Carrier

42. The *Competitive Carrier* decisions and our proposals here impact carriers' tariff and facilities licensing requirements. In the domestic market we have forborne from regulating all non-dominant carriers. Here, we propose only to streamline international non-dominant carriers. We feel that streamlining is an appropriate first step in an environment now undergoing dynamic changes. As the new structure of the international market evolves we will be in a better position to consider and evaluate further streamlining and forbearance options.

A. Tariff Requirements

43. We tentatively propose to subject the tariffs of non-dominant firms to the streamlined rules developed in the *Competitive Carrier* proceedings. Under streamlining, tariffs filed by non-dominant carriers for the provision of services under the Commission's rules are presumptively lawful. Only fourteen days advance notice is required before non-dominant carrier tariffs take effect, 47 C.F.R. §61.58(b). In addition §61.38 economic and cost data is not required.

44. The standard of review we propose for petitions to suspend tariffs of non-dominant carriers is whether the injury to competition which would result if the tariff were allowed to take effect is greater than the harm to the public from not allowing the tariff to take effect. The burden of proof will be on the party asking that the tariff be suspended.

B. Facilities Licensing

45. We also propose to apply streamlined regulation to non-dominant carriers for §214 facilities licensing. On the domestic side, streamlined carriers are given blanket authority for unlimited expansion of circuits anywhere in the United States. A reporting requirement noting any addition of circuits within thirty days of their placement in service is required. Discontinuance of service is allowed provided that thirty days notice is given to customers and no showing is made that a reasonable substitute is not available.

46. Because international carriers participate in the facilities planning process and submit circuit status reports and activation/usage plans, it would appear that streamlining the §214 facility authorization process would not adversely affect our oversight, monitoring or facilities planning responsibilities. Additional information is filed under Sections 43.61 (*e.g.*, revenues, messages, minutes, etc.) and 43.52 (*e.g.*, contracts and operating agreements). We do not propose any changes in these reporting requirements in this proceeding. In addition, the granting of applications filed by the IRCs and other non-dominant carriers has over the last several years become routine.

47. Specifically, we propose that those carriers found to be non-dominant be required to file an initial application under §63.01 in order to provide service to a specific country. Once the initial grant is given, a carrier will not have to file any additional applications for adding circuits or changing facilities. We tentatively conclude, however, that even non-dominant carriers will be required to file applications to construct, acquire or operate lines in all major facility projects (such as the transatlantic cables) or to acquire capacity from any future private cable or satellite sources. (See Appendix A). Authorizations on these projects are necessary for our long-range facilities planning as well as the consultative process and is consistent with our recent policy statement concerning private submarine cables. *See*, Tel-Optik, Ltd., FCC 85-99 released April 5, 1985. Domestic non-dominant carriers are required to submit Section 63.07 reports noting circuit additions on a semi-annual basis. In the international sector we believe a separate report is unnecessary and that it will be sufficient for carriers to note circuit additions in their circuit status reports on a semi-annual basis (December and June).[42]

V. Conclusion

48. We remain committed to the elimination of unnecessary and burdensome regulation where possible. Our *Competitive Carrier* decisions have shown that when there is competition in a given market it is possible to streamline tariff and facility regulations for non-dominant carriers. The marketplace will ensure that those carriers act in the public interest. Any non-dominant carrier attempting to charge unreasonable rates or carry out unreasonable policies will be met by competition from new or existing service providers, forcing them to yield to the demands of the marketplace. In addition, we emphasize that we are in no way abandoning our oversight duties and will remain ready to intercede upon complaint or whenever the need develops. We believe that implementation of an international competitive carrier policy will allow carriers to operate more efficiently and innovatively and will allow our recent decisions allowing more competition in the international service markets to have a greater effect.

49. Above, we tentatively concluded that there is now sufficient competition in the international telecommunications market to allow implementation of competitive carrier policies. Our analysis of international telecommunications services leads us tentatively to find two

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[42] At the present time the circuit status reports of some carriers, at the request of those carriers, are treated as confidential for several months. Since we believe circuit additions should be public (and are public for non-dominant domestic carriers pursuant to Section 63.07 of our Rules), non-dominant international carriers may desire to combine circuit additions data with their circuit status reports. Carrier comments on this reporting process is encouraged.

product markets — IMTS and non-IMTS for purposes of this notice. Further, we tentatively find that each country represents a separate geographic market. Based upon these market definitions we tentatively find that only AT&T, those companies that are the primary service providers of IMTS for non-contiguous domestic points and Comsat's provision of space segment and earth station services are dominant. All other providers of IMTS are non-dominant. In addition, we tentatively find that all carriers providing non-IMTS services are non-dominant and subject to streamlined regulation. We invite all interested parties to comment upon our tentative conclusions as well as any other issues applicable to this rulemaking.

VI. Ordering Clauses

50. Accordingly, pursuant to Section 4(i), 4(j), 201-205, 214 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 201-205, 214, 403 (1976), IT IS ORDERED that a rulemaking IS HEREBY INSTITUTED into the above-described issues.

51. IT IS FURTHER ORDERED, pursuant to applicable procedures set forth in Section 1.410 and 1.415 of the Commission's Rules, that, on or before May 24, 1985, and on or before June 14, 1985, all interested persons may file comments and reply comments, respectively. Before final action is taken in this proceeding we shall consider all relevant and timely comments filed. In reaching a decision on this matter we may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of our reliance upon such information is noted in the Report and Order. Participants must file an original and five copies of all comments. If participants wish each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. They should serve reply comments upon all those who file comments in this rulemaking. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

52. IT IS FURTHER ORDERED, that for purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting. In general, an *ex parte* presentation is any written or oral communication (other than formal written com-

ments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's rules, 47 C.F.R. §1.1231.

53. Pursuant to Section 605(b) of the Regulatory Flexibility Act (P.L. 96-354), IT IS CERTIFIED, that Sections 603 and 604 of the Act do not apply because these rule changes will not, if promulgated, have a significant economic impact on a substantial number of small entities. See 5 U.S.C. Sections 603, 604, 605(b). Provision of international telecommunications services requires the commitment of amounts of capital in excess of those that characterize a small entity.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix A

§63.09 Special procedures for non-dominant international carriers.

(a) Any party that would be a non-dominant international communications common carrier must file an application pursuant to §63.01 for certification to initiate a service to any point or to construct, acquire or operate lines in any major common carrier facility project or any facility offering capacity on a non-common carrier basis.

(b) Any non-dominant international carrier certified to provide a service to a particular point is authorized to construct, acquire or operate any transmission line to that point except as provided in subsection (a) above.

Common Carrier
Customer Premises Equipment
Telephone Company, AT&T

Memorandum Opinion and Order adopted which reconsiders, and upholds, the length of the transition period and length of price increase intervals for the multi-line business leasing program established as part of detariffing of AT&T's embedded customer premises equipment.

Customer Premises Equipment.
CC Docket No. 81-893

FCC 85-174

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Procedures for Implementing The Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)	CC Docket No. 81-893

MEMORANDUM OPINION AND ORDER

Adopted: April 9, 1985; Released: May 16, 1985

BY THE COMMISSION: COMMISSIONER QUELLO DISSENTING.

I. Introduction

1. In December 1983, we adopted the *CPE Detariffing Order*[1] in this docket, which implemented a program for the detariffing of the embedded customer premises equipment (CPE) owned by the American Telephone and Telegraph Company (AT&T). Subsequently, in the *Mobile CPE Detariffing Order*,[2] we clarified certain aspects of the multi-line business leasing program described in the *CPE Detariffing Order*. In particular, the *Mobile CPE Detariffing Order* confirmed that, under the detariffing program, multi-line business CPE was subject to a 24-month price

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[1] CC Docket No. 81-893, Report and Order, 95 FCC 2d 1276 (1983) (hereinafter *CPE Detariffing Order*).

[2] CC Docket No. 81-893, Second Report and Order, FCC No. 84-269, 49 Fed. Reg. 27754 (released June 29, 1984) (hereinafter *Mobile CPE Detariffing Order*).

predictability period from the date the equipment was offered for sale. During this transition period, AT&T Information Systems (AT&T-IS) would be allowed three price increases at eight-month intervals with the final increase at the end of the 24-month period. Based on the explanations and clarifications made in the *Mobile CPE Detariffing Order,* AT&T-IS has petitioned the Commission to reconsider those portions of the *CPE Detariffing Order*[3] and *Mobile CPE Detariffing Order* dealing with the length of the transition period as a whole, and the intervals between price increases, for multi-line business equipment. In this Order we find that the price predictability program for multi-line business equipment reasonably balances the interests of the various affected parties, and we deny AT&T-IS's petition to modify it.

II. Background

2. The detariffing and transfer plan we adopted in the *CPE Detariffing Order* was based in large part on a proposal put forth by AT&T in its comments in this docket.[4] In the section of that plan dealing with the leasing of multi-line business CPE, AT&T proposed an 18-month transition period with prices increased at three six-month intervals. Prices would rise from an initial minimum set at the discretion of AT&T to a maximum, or cap, which would be equal to the highest state tariff. Customers whose rates were below the initial minimum would have their rates immediately raised to that level. The plan we adopted modified the AT&T proposal in several important respects.[5] The national price cap was set at 70 percent of the highest state tariff in effect as of March 29, 1983, or at the median of all the state tariffs in effect, whichever was higher. Customers whose rates where above the national maximum would immediately have their rates lowered to it. The transition period, known as the "price predictability" period, would begin only when AT&T offered the equipment for sale and would extend for 24 months.[6] Finally, AT&T

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[3] AT&T-IS filed a petition for reconsideration of the *CPE Detariffing Order* on Aug. 6, 1984. As AT&T-IS noted, the normal period for filing such a petition expired on Jan. 30, 1984. AT&T-IS Petition for Reconsideration at 1 n.1. We have decided, however, that AT&T-IS's letter to the Commission on Jan. 6, 1984, Letter From D.J. Culkin to Chief, Common Carrier Bureau (Jan. 6, 1984), asking for a clarification of the *CPE Detariffing Order's* multi-line price increase interval, was the equivalent of a petition for reconsideration. Therefore, we will address the merits of the issues raised by AT&T with regard to the *CPE Detariffing Order.*

[4] AT&T Supplementary Comments in CC Docket No. 81-893, filed Oct. 23, 1982.

[5] *CPE Detariffing Order,* 95 FCC 2d at 1330-1346.

[6] AT&T decided to offer all of its multi-line CPE for sale as of January 1, 1984. Several parties contend that this action by AT&T-IS was insufficient to initiate the running of the price predictability period. They argue that price predictability will not begin until a sales quote is provided to a customer. We have addressed this issue in the Reconsideration of the *CPE Detariffing Order* and have decided that the price predictability period for

would be able to raise lease rates from the initial minimum to the cap in three eight-month steps, with the final price increase at the end of the price predictability period.

3. In two letters to the Chief, Common Carrier Bureau, AT&T-IS sought clarification of what it asserted was an ambiguity in the price predictability plan set out in the *CPE Detariffing Order.*[7] AT&T-IS argued that under that plan the eight-month interval requirement applied only to CPE that would not be offered for sale on January 1, 1984. Because all of its multi-line CPE was offered for sale on that date, AT&T-IS argued that it could raise its lease rates at six-month intervals as proposed in the plan it submitted to the Commission.

4. In the *Mobile CPE Detariffing Order,* we rejected AT&T-IS's interpretation of the lease rate increase interval.[8] We stated that our price predictability plan permits increases for multi-line business CPE only at eight-month, not six-month, intervals. We also reiterated our intention that this modification of the AT&T plan served broad policy objectives, including easing the potential for rate shock.[9]

5. Shortly before we adopted the *Mobile CPE Detariffing Order,* the International Communications Association (ICA) asked us to order AT&T-IS to cease and desist from executing a rate increase on July 1, 1984, two months before AT&T-IS was authorized to increase its rates. In an Order in CC Docket No. 81-893, released the same day as the *Mobile CPE Detariffing Order,* the Commission allowed the July 1, 1984, increase to take effect because it would have been very difficult, as a practical matter, for AT&T-IS to reverse it. Moreover, halting the rate increase might have led to billing confusion among customers. However, as compensation for the premature price increase in 1984, we directed AT&T-IS to postpone the next increase from May 1, 1985, to July 1, 1985.[10] In the *Multi-line Lease Rates Order,* the Commission "admonished [AT&T] for taking these unilateral actions in disregard of the plain meaning of the *CPE Detariffing Order.*"[11]

6. AT&T-IS, in its petition for reconsideration, argues that its proposed price predictability program adequately balanced all the interests of the parties in removing embedded multi-line CPE from the rate base. It

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embedded multi-line business CPE began January 1, 1984, and will run until December 31, 1985. *See* CC Docket No. 81-893, Memorandum Opinion and Order on Reconsideration, 50 Fed. Reg. 9016 (1985) (hereinafter *CPE Reconsideration Order*) at paras. 25-35.

[7] Letter from D.J. Culkin to Chief, Common Carrier Bureau (January 6, 1984), and Letter from T.L. Trantina to Chief, Common Carrier Bureau (March 1, 1984).

[8] *Mobile CPE Detariffing Order* at paras. 19-25.

[9] *Id.* at para. 25.

[10] CC Docket No. 81-893, Order, FCC No. 84-304, 49 Fed. Reg. 30710 (released June 29, 1984) (hereinafter *Multi-line Lease Rates Order*).

[11] *Id.* at para. 9.

states that its program would have provided stability during the transition to a completely deregulated CPE marketplace, avoided rate shock, and ensured that its costs were met. AT&T-IS contends that our modifications to its program upset the delicate balance the original proposal achieved. It also suggests that "[i]t is doubtful . . . that the Commission fully considered — or was aware of — the severity of the consequences of modifying the price increase interval."[12]

7. In particular, AT&T-IS argues that the extension of the price predictability period from 18 to 24 months, and the extension of the lease rate increase intervals from six to eight months, will result in a decrease in revenues of $300 million in 1985, as compared to the revenues it would have earned if its original plan had been adopted. In addition, AT&T-IS argues that the Commission has made no finding that embedded multi-line CPE customers required any protection beyond that offered in the original AT&T plan. Finally, AT&T-IS asserts that our failure to respond on the merits to its request for clarification of the *CPE Detariffing Order* before the March 1, 1984, deadline for establishing the initial minimum lease prices, resulted in its losing the opportunity to adjust the initial minimum lease prices to compensate for the financial consequences of our decisions to extend the transition period and the lease rate increase intervals.

8. ICA opposes AT&T-IS's petition for reconsideration.[13] It argues that AT&T-IS's detariffing plan, rather than being illustrative of AT&T's cooperative attitude on deregulation, is a part of AT&T's long-term attempt to block the Commission's detariffing effort. ICA also contends that the $300 million revenue shortfall highlighted by AT&T-IS is actually an attempt by AT&T-IS to obtain a revenue guarantee in the face of competition. It concludes that AT&T-IS's actions are indicative of its control over a class of users who are unable to realize the benefits of a competitive market.

III. Discussion

9. Our modifications to AT&T's embedded multi-line lease proposals were based on a comprehensive review of the relative interests of AT&T's multi-line business customers and of AT&T's shareholders. The decisions to extend the transitional price predictability period from 18 to 24 months and the intervals between price increases from six to eight months represent a reasonable balancing of those interests. These modifications were motivated by concerns about the complexity of the choices facing many multi-line business subscribers, and about these subscribers' ability

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[12] AT&T-IS Petition for Reconsideration at 13.

[13] ICA Opposition at 1.

to evaluate their telecommunications needs within an 18-month period.[14] These modifications were also motivated by a desire to minimize changes to the underlying framework of the proposed AT&T plan.

10. The extension of the price predictability period for six months provides AT&T's multi-line business customers with an enhanced opportunity to make an informed choice about their future telecommunications requirements. It also allows multi-line business customers the same period of time in which to make a decision as that provided to residential and single-line business customers under the original AT&T proposal. As AT&T has noted in prior comments filed in this docket, its provision of price information for multi-line users is a complex task requiring significant time and resources.[15] This information, which is difficult to compile, is also difficult for customers to analyze, especially when they are faced with complex alternative proposals from AT&T-IS and its competitors. In this context, the addition of six months to the price predictability program should be of significant benefit to multi-line business consumers.

11. The second Commission modification to AT&T's proposal, the extension of the interval between price increases by two months, derived from our decision to extend the price predictability period to 24 months. Under the AT&T plan, there were to be three price increases spaced at equal intervals during the transition period. We decided to preserve this feature of the AT&T proposal and, accordingly, added two months to the price increase interval to maintain the number and relative spacing of price increases. Thus, while the AT&T proposal had increases at six months, 12 months, and 18 months (the end of the transition period), under our plan increases are allowed at eight months, 16 months, and 24 months (the end of the modified transition period).[16] The addition of two months to the price increase intervals also provided additional benefits to consumers by allowing a more gradual transition to AT&T's national prices.[17]

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[14] *CPE Detariffing Order,* 95 FCC 2d at 1334-1336.

[15] AT&T Response to Request for Information in CC Docket No. 81-893, filed Oct. 7, 1983, at 12-13, cited in ICA Opposition at 12. *See also, CPE Reconsideration Order* at para. 35.

[16] AT&T-IS argues that placing the third price increase at the end of the price predictability period effectively extends the period beyond 24 months. We reject this argument as we are placing no limitations on AT&T-IS's ability to raise prices once price predictability has ended. Moreover, this aspect of our plan conforms to the price increase timing of the AT&T proposal. Our decision to extend the price predictability period for six months did not alter this part of AT&T's plan.

[17] AT&T-IS argues that the record contains no information that would allow the Commission to reach this conclusion. We find this argument unpersuasive. As explained above, the decision to extend the price increase intervals from six to eight months was based in part on our decision to extend the price predictability period from 18 to 24 months. There was substantial support in the record for lengthening the price

12. The Commission plan, in addition to benefitting AT&T's customers, did not ignore AT&T's financial concerns. The plan adopted in the *CPE Detariffing Order* retained many aspects of the AT&T proposal that served to protect AT&T's ability to meet its financial requirements. We allowed AT&T-IS complete flexibility, subject to the national price limits, to set its initial prices for multi-line equipment. We then allowed AT&T-IS to move from these initial prices to the national price predictability limits in three equal steps. AT&T-IS was free to set its initial prices as close to the maximum allowable prices as it wished, or at some lesser price at its option. This aspect of the Commission plan was specifically included to provide AT&T-IS with the capability to make price decisions that would aid in the recovering of investment in the embedded CPE base.[18] Thus, the Commission was aware, contrary to AT&T-IS's assertions,[19] of the potential impact of its actions on AT&T-IS's capability to recover revenues. The plan we created in the *CPE Detariffing Order* granted AT&T-IS sufficient discretion to avoid any adverse impacts which might have occurred. AT&T-IS's failure to make the fullest use of the discretion granted it in our plan does not provide a sufficient rationale for us to reconsider it.

13. AT&T-IS also argues that the eight-month lease rate interval decision should be revised because AT&T-IS was unable to make effective use of its discretion over initial prices. AT&T-IS contends that had it been aware of the Commission's interpretation of the *CPE Detariffing Order*[20] it could have significantly reduced the revenue loss associated with the

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predictability period, as well as for limiting AT&T-IS's discretion to raise prices to a greater degree than AT&T had proposed in its plan. *See CPE Detariffing Order* at paras. 86-112. In this instance we perceived eight-month price increase intervals as providing substantial benefits for AT&T-IS's multi-line lease customers. *See Mobile CPE Detariffing Order* at para. 25.

[18] *See CPE Detariffing Order*, 95 FCC 2d at 1345. AT&T-IS indicates that in December 1983 and January 1984 it had the option of providing initial prices and subsequent increases based on an eight-month step period. AT&T-IS Petition for Reconsideration at 15. However, it also notes that, because of time constraints from other commitments, it would have been very difficult to process such material. We find this latter contention somewhat puzzling in light of information provided in a letter from ICA, which indicates that lease rate data based on eight-month steps were available to AT&T-IS and its field representatives in December 1983. *See* Letter from Counsel for ICA to Chief, Common Carrier Bureau (July 9, 1984) (*ICA Letter*). ICA also provided certain supporting documents for its claim. Confidential treatment was requested for these supporting documents, and we have granted such treatment. We do not rely on these documents in reaching the decision set forth in this Order.

[19] *See supra* para. 6.

[20] *See Mobile CPE Detariffing Order* at paras. 19-21.

Commission action.[21] This argument for reconsideration of the eight-month decision is unpersuasive for several reasons. First, the *CPE Detariffing Order* was not unclear and could only reasonably be interpreted to require eight-month price increase intervals. Second, AT&T-IS established its initial prices based on its view of the *CPE Detariffing Order*. It was aware that its view was not sanctioned by the Commission[22] and was flatly opposed by other parties.[23] The fact that it made a judgment based on a strained interpretation of the *CPE Detariffing Order* was an exercise of its business discretion and is not an action of this Commission. Third, we are not persuaded by AT&T-IS's argument that its present predicament is in some sense the result of our not immediately clarifying what we believed to be a clear statement of our policy.[24] This conclusion is reinforced by AT&T-IS's own admission that it had the option of setting initial prices and subsequent prices on the basis of eight-month price increase intervals,[25] and by the fact that there was disagreement within AT&T-IS as to the meaning of the *CPE Detariffing Order*.[26] AT&T-IS could have chosen a pricing strategy based on a more conservative reading of the *CPE Detariffing Order*, and its failure to do so is not grounds for reconsidering our existing policy.[27]

14. In a letter submitted to the Commission after release of the *Mobile CPE Detariffing Order*, ICA contended that the Commission should modify the price predictability program to create additional safeguards for embedded multi-line customers.[28] The ICA letter refers to a pricing

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[21] AT&T-IS Petition for Reconsideration at 14. This comment by AT&T-IS would seem to be an implicit admission that the Commission plan described in the *CPE Detariffing Order* was sufficiently flexible to meet AT&T-IS's financial requirements.

[22] *See* Letter from Chief, Common Carrier Bureau, to D.J. Culkin (Jan. 17, 1984).

[23] *See* Letter from Counsel for ICA to Chief, Common Carrier Bureau (Jan. 13, 1984).

[24] Moreover, as a practical matter, AT&T-IS has failed to demonstrate that the modifications will have a material impact on its ability to achieve its financial objectives. As AT&T-IS itself argues, the level of competition for multi-line CPE may require AT&T-IS to establish lease rates below the national maximum. AT&T-IS Petition for Reconsideration at 9. AT&T-IS's revenue expectations are, therefore, somewhat conjectural, because AT&T-IS cannot know how competition will affect its prices.

[25] *See supra* note 18.

[26] *See* Letter from Terry L. Trantina to Secretary, FCC (July 23, 1984) at 3.

[27] The postponement of the second step increase from May 1, 1985, to July 1, 1985, pursuant to the *Multi-Line Lease Rate Order*, does not provide additional grounds for finding that AT&T-IS's financial interests are not sufficiently protected. The postponement was imposed to offset AT&T-IS's premature lease rate increase of July 1, 1984, because the Commission found that AT&T-IS had disregarded the *CPE Detariffing Order* in implementing that increase. *Multi-Line Lease Rate Order* at paras. 7, 9.

[28] *ICA Letter, supra* note 18. Although these modifications were not raised in ICA's Opposition to AT&T-IS's Petition for Reconsideration, we address them here to further a complete resolution of all the issues in this area. However, we decline to address ICA's arguments raised in its letter that the price predictability period did not begin on January

manual created by AT&T-IS to assist its managers in developing sales quotes for those customers interested in purchasing their embedded multi-line equipment.[29] ICA asserts that this manual lists price increases at eight-month, rather than six-month, intervals, and that this demonstrates that AT&T-IS was aware of the Commission's intent in the *CPE Detariffing Order*. AT&T-IS argues that the inclusion of eight-month lease rate intervals in the manual was a mistake based on information contained in the Public Notice of the Commission's November 23, 1983 decision adopting the *CPE Detariffing Order* and on a hurried reading of the Order itself (released December 15, 1983) by employees responsible for the quick preparation and distribution of the manual.[30]

15. We agree with AT&T-IS that the inclusion of eight-month intervals in the manual does not conclusively demonstrate AT&T-IS's interpretation of the *CPE Detariffing Order* or provide a basis for additional sanctions against AT&T-IS. As AT&T-IS notes, the manual was prepared under extreme time constraints, and one week after release of the *CPE Detariffing Order* AT&T-IS's management instructed its field representatives (in a December 22, 1983 letter) that the pricing intervals in the manual were incorrect. AT&T-IS later distributed a new manual based on six-month price increase intervals. While the existence of the manual might raise some questions about certain of AT&T-IS's arguments in this reconsideration,[31] we decline to impose any further requirements on AT&T-IS with respect to the implementation of the *CPE Detariffing Order*.

IV. Ordering Clauses

16. Accordingly, IT IS HEREBY ORDERED, that the petition for reconsideration filed by AT&T Information Systems IS DENIED.

17. IT IS FURTHER ORDERED that the comments filed by International Communications Association and the response filed by AT&T Information Systems ARE ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

1, 1984. These arguments have already been examined in the Reconsideration of the *CPE Detariffing Order*. *See supra* note 6.

[29] It also appends a portion of what appears to be such a manual. As we noted previously, we are in no way relying on the contents of the manual submitted by ICA. *See supra* note 18.

[30] Letter from Terry L. Trantina to Secretary, FCC (July 23, 1984) at 3-4.

[31] *See supra* note 18.

Common Carrier
Customer Premises Equipment
Telephone Company, AT&T

Memorandum Opinion and Order adopted reconsidering the *First Report and Order* in CC Docket No. 81-893, 95 FCC 2d 1276 (1983). Commission examined the termination charge provisions of CPE lease contracts transferred to AT&T-IS from BOCs and AT&T-IS's termination charge practices, and concluded that neither is inconsistent with the Communications Act or the Commission's previous orders.
—*Customer Premises Equipment*
CC Docket No. 81-893

FCC 85-220

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)	CC Docket No. 81-893
American Telephone and Telegraph Company Request for Approval to Supplement the Capitalization of AT&T Information Systems in Connection with the Transfer of Embedded Customer Premises Equipment	File No. ENF 83-18

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1985; Released: May 15, 1985

BY THE COMMISSION: COMMISSIONER RIVERA NOT PARTICIPATING.

I. Introduction

1. In December 1983, we released the *CPE Detariffing Order*[1] in this docket implementing a program for the detariffing of embedded customer

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[1] Procedures for Implementing the Detariffing of Customer Premises Equipment (Second Computer Inquiry), Report and Order, 95 FCC 2d 1276 (1983) (hereinafter *CPE Detariffing Order*).

premises equipment (CPE)[2] owned by the American Telephone and Telegraph Company (AT&T). In that Order we permitted AT&T to transfer to AT&T Information Systems (AT&T-IS) virtually all embedded CPE and AT&T had received from the Bell Operating Companies (BOCs)[3] as a result of the court-ordered divestiture proceeding in *United States v. AT&T*.[4] A portion of the embedded CPE transferred to AT&T-IS was multiline business CPE that the BOCs leased to customers pursuant to long-term contracts approved under state tariffs. These contracts contained provisions that allowed the lessor to recover certain charges in the event of early termination by a lessee. Since the transfer and detariffing of the embedded CPE, AT&T-IS has been waiving, or applying credits against, these termination charges for customers who terminate existing contracts in order to buy in-place equipment or new AT&T-IS equipment. The Independent Data Communications Manufacturers Association, Inc. (IDCMA) filed a petition with the Commission requesting that we review AT&T-IS's enforcement of the termination charge provisions of the CPE lease contracts. We did not address this issue in the *CPE Detariffing Order*, and in our reconsideration of that order (*CPE Detariffing Reconsideration*), we decided to defer a decision on termination charges.[5] We now conclude that the CPE lease contracts and their termination charge provisions do not conflict with the Communications Act[6] or our previous orders, although we make no findings about their validity under state contract law. We conclude further that nothing in the Communications Act or our previous orders prevents AT&T-IS from freely exercising its business discretion in its enforcement of all the provisions of the CPE lease contracts. However, we propose that increases in the Tier B portion of two-tier contracts be limited to increases in the Consumer Price Index (CPI) until the end of the contract period, and we will shortly issue a Public Notice inviting comments on this proposal.

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[2] For a definition of "CPE" as it is used in this proceeding, see *CPE Detariffing Order* at para. 1 n.2.

[3] For a description of the CPE that was not transferred to AT&T and detariffed, see *CPE Detariffing Order* at para. 5 n.9.

[4] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 1983) (hereinafter *U.S. v. AT&T* or Modification of Final Judgment (*MFJ*)).

[5] *See* Procedures for Implementing the Detariffing of Customer Premises Equipment (Second Computer Inquiry), Memorandum Opinion and Order on Reconsideration, 50 Fed. Reg. 9016 (1985) (hereinafter *CPE Detariffing Reconsideration*). For a summary of the issues raised in the reconsideration, see *CPE Detariffing Reconsideration* at paras. 6-9.

[6] Communications Act of 1934, 47 U.S.C. §§ 151-610 (1981).

II. Background

2. In our *Final Decision* in the *Second Computer Inquiry,*[7] we determined that "the terminal equipment market is subject to an increasing amount of competition as new and innovative types of CPE are constantly introduced into the marketplace by equipment vendors."[8] We also found that consumers were deriving substantial benefits from these competitive forces, but that these benefits could be jeopardized by continued regulation of CPE, which we determined was inconsistent with a competitive marketplace.[9] Accordingly, we decided that CPE should be removed from regulation. However, we also decided that the immediate deregulation of all CPE offerings would not be in the best interest of telecommunications vendors and consumers, and required a bifurcated deregulatory process. Offerings of new CPE were detariffed as of January 1, 1983, and embedded equipment was to be detariffed at a later date.[10]

3. After we determined that the terminal equipment market should be deregulated, but before we had implemented any plan for detariffing the embedded base owned by AT&T and the independent telephone companies, the United States District Court for the District of Columbia approved an agreement between AT&T and the Department of Justice in *U.S. v. AT&T.*[11] The *MFJ* required AT&T to divest itself of the BOCs and certain other of its assets. As part of divestiture, the embedded CPE owned by the BOCs, together with assets and personnel utilized for the installation and maintenance of the embedded CPE, were to be transferred to AT&T.

4. Prior to detariffing and divestiture, the BOCs leased multiline CPE to their customers both on a month-to-month basis and under long-term contracts. Both of these types of lease arrangements were based on state tariff provisions. The long-term contracts, because they provided the

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[7] Second Computer Inquiry, Final Decision, 77 FCC 2d 384 (hereinafter *Final Decision*), *modified on reconsideration*, 84 FCC 2d 50 (1980), *further modified on reconsideration*, 88 FCC 2d 512 (1981) (hereinafter *Further Reconsideration Order*), *aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied)*, 461 U.S. 938 (1983). For a further discussion of the background leading up to our adoption of the *CPE Detariffing Order*, see *CPE Detariffing Order* at paras. 7-20. *See also CPE Detariffing Reconsideration* at paras. 3-5.

[8] *Final Decision* at para. 141.

[9] *Id.* at para. 145.

[10] For an explanation of the difference between new and embedded CPE, see *CPE Detariffing Order* at para. 1 n.5.

[11] 552 F. Supp. 131. Pursuant to the *MFJ*, AT&T was required to file a plan of reorganization, which was also approved by the court. *See* AT&T Plan of Reorganization, *United States v. AT&T* (filed December 16, 1982) and approved in *United States v. Western Electric Co.*, 569 F. Supp. 990 (D.D.C.), *aff'd sub nom. California v. United States*, 104 S. Ct. 542 (1983).

BOCs with an assured revenue stream, typically contained monthly charges that were significantly less than those in month-to-month arrangements.[12] There existed two primary types of long-term contracts, variable term pricing plan (VTPP) contracts and two-tier contracts. VTPP contracts required the customer to pick a lease period, during which the customer would pay a fixed amount that was not subject to change by the BOC.[13] If the customer wished to terminate before the lease period expired, the contract provided for the payment by the customer of a termination charge, which varied depending on the amount of the monthly payments and the remaining life of the lease at the time of termination. Two-tier contracts were similar to VTPP arrangements in that the customer contracted for a specific lease period and early termination was subject to a charge.[14] Under two-tier contracts, however, the monthly charge was composed of two separate rates. The Tier A rate, which covered the capital cost and installation of the equipment, was fixed for the duration of the contract and was not subject to change by the company. The Tier B rate, however, which covered maintenance costs, was not specified in the contract, but was set pursuant to tariffs filed with state public utility commissions (PUCs), and could change during the life of the contract.

5. The transfer of the BOCs' embedded CPE to AT&T as part of the AT&T reorganization made the timely development of a detariffing plan for that CPE imperative due to the potential costs (associated with maintaining the embedded base under regulation) that AT&T might incur if detariffing were delayed. Accordingly, shortly before divestiture, we adopted the *CPE Detariffing Order*, which detariffed AT&T's embedded CPE effective the same date as divestiture. The *CPE Detariffing Order* specified that "a sale plan for embedded CPE, coupled with the transfer of the unsold portion of the embedded base to unregulated service, would serve as the foundation of the detariffing plan . . . ."[15] Some of the

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[12] AT&T-IS has explained that:

> [F]ixed-term agreements [were made] for periods ranging from 12 to 144 months. Selection of a fixed-term agreement assured customers of a lower monthly rate than that available to month-to-month customers and that the company would not increase that rate during the contract term selected. In return, AT&T was assured of a known revenue stream to offset its investment and the expenses associated with the CPE without the risk of premature retirement or additional expenses.

Letter from Terry L. Trantina to Chief, Common Carrier Bureau (June 19, 1984), at 2 (hereinafter *AT&T-IS June Letter*).

[13] The VTTP leases generally had terms of two to four years. *See* Letter from David J. Ritchie, AT&T-IS General Attorney, to Secretary, Federal Communications Commission (March 11, 1985), at 3 (hereinafter *AT&T-IS March Letter*).

[14] The two-tier leases generally had terms of three to seven years. *See id.*

[15] *CPE Detariffing Reconsideration* at para. 3.

elements of the detariffing plan for multiline business CPE[16] were: (1) net book value was used as a surrogate for economic value in transferring the embedded base to AT&T-IS (2) AT&T-IS was required to offer embedded CPE for sale to in-place customers; and (3) while AT&T-IS's sales prices for embedded multiline CPE were not set, AT&T-IS would not be allowed to recover, in the aggregate, more than the net book value of embedded multiline CPE. Those customers who wished to continue using AT&T-IS as their multiline CPE supplier, and were under month-to-month arrangements or had two-tier CPE lease contracts, received the protection of a two-year price predictability period. During this period, the rates for month-to-month leases and the Tier B portion of two-tier leases would start at an initial minimum set by AT&T and rise to a national lease rate in three steps, spaced eight months apart.[17] The national lease rate would be limited to 70% of the highest state tariff in effect as of March 29, 1983, or the median of all state tariffs in effect on that date, whichever was greater. For those customers who leased CPE under a long-term contract with a specified lease rate in the contract (*i.e.*, VTPP contracts and the Tier A portion of two-tier contracts), the contractual rate substituted for price predictability. During the life of the contract, the lease rate would govern, and AT&T-IS would not be permitted to increase it even if it were below the national lease rate set for price predictability purposes.

6. Since detariffing, AT&T-IS has established certain policies concerning the enforcement of the termination charge provisions of the CPE lease contracts. These policies may be summarized as follows: (1) if a customer purchases its in-place CPE from AT&T-IS, no termination charge applies; (2) if a customer seeks to upgrade its existing system by purchasing (or leasing) new CPE from AT&T-IS, the termination charge is not waived, but usually a partial credit is applied against the termination charge; (3) if a customer terminates a lease contract before its expiration date without purchasing its in-place CPE, or leasing or purchasing new CPE from AT&T-IS (*e.g.*, in order to purchase or otherwise obtain CPE from another vendor), the full termination charge applies.[18]

7. In response to the *CPE Detariffing Order*, numerous petitions for reconsideration were filed,[19] including a petition by IDCMA contending that AT&T-IS should be prohibited from enforcing the termination charges provided for in long-term CPE lease contracts. Several other parties filed comments, during and after the pleading cycle, on the issues

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[16] Only the multiline portions of the plan are relevant to the issues raised in this Order. For a complete description of the plan, see *CPE Detariffing Order* at para. 21.

[17] *See id.* at paras. 105-11.

[18] *AT&T-IS June Letter, supra* note 12, at 2-3.

[19] For a list of parties filing reconsideration petitions, see *CPE Detariffing Reconsideration*, App. A.

raised by IDCMA. In the *CPE Detariffing Reconsideration*, we affirmed, with minor revisions, the detariffing plan established in the *CPE Detariffing Order*. We decided, however, not to address the issues presented by AT&T-IS's termination charge practices and stated:

> The desirability of an immediate resolution of many of the other issues raised in this proceeding, and the importance of the concerns raised by the termination charge issue, mandates this conclusion [not to address the termination charge issue]. Our conclusion is also prompted by the fact that the uniqueness of the questions raised by the issue and the number of comments filed and inquiries made well after completion of the normal reconsideration pleading cycle make it necessary to take additional time to engage in further analysis before arriving at a decision. We will, therefore, address the full range of termination charge questions noted in the comments in a subsequent Order in this docket.[20]

III. Comments

8. The IDCMA petition requests that the Commission condition the transfer of CPE to AT&T-IS on the requirement that AT&T-IS be prohibited from applying the termination charges provided for in the long-term CPE leases.[21] It argues that "[e]mbedded users should not have to pay a penalty if they wish to turn to alternative sources of equipment,"[22] and that "such a penalty would be a transparent attempt by AT&T-IS to maintain current users through unjustifiable and anticompetitive means."[23]

9. There have been a substantial number of comments submitted on this issue, alleging a variety of concerns regarding AT&T-IS's termination charge practices and proposing a number of possible solutions.[24] These comments have focused on several issues: (1) whether the long-term contracts are valid and assignable to AT&T-IS; (2) whether the termination charge provisions of those contracts and their application by AT&T-IS are unfairly harming other vendors and manufacturers in the CPE marketplace; and (3) whether termination charge provisions of the long-term contracts allow AT&T-IS to recover a "windfall" at the expense of the CPE lease customers.

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[20] *Id.* at para. 47.

[21] IDCMA Petition for Reconsideration at 2.

[22] *Id.* at 4.

[23] *Id.*

[24] A significant number of the pleadings on this issue were received very recently, substantially past the close of the comment cycle for reconsideration of the *CPE Detariffing Order*. Respondents have convinced us of the need in this proceeding to consider their comments in our review of the termination charge issue, particularly since respondents indicate that the problem did not become apparent until recently. However, parties should not expect the Commission to accept and consider routinely any pleadings or letters filed after the close of a pleading cycle. For a summary of the early comments, see *CPE Detariffing Reconsideration* at paras. 43-45.

10. North American Telecommunications Association (NATA) and ROLM Corporation (ROLM) first argue that the Commission does not have the authority under the Communications Act to rule that the long-term CPE leases are actually valid, enforceable contracts or that they are, as a matter of contract law, properly assignable from the BOCs to AT&T-IS. They contend that such questions are matters of state law and should be left to state courts.[25] However, these parties also argue that we should hold that the contracts are enforceable against AT&T-IS, because AT&T-IS in this proceeding pledged to the Commission that it would abide by them as a condition of deregulating the embedded CPE base. AT&T-IS, on the other hand, argues that the Communications Act does provide the Commission with sufficient authority to address these contractual issues. In support of its contention that the leases are valid, AT&T-IS cites the Uniform Commercial Code and notes that the lease customers received, and continue to receive, the benefit of low, long-term rates. It concludes that the Commission should declare that the CPE long-term leases are valid, enforceable contracts that were properly assigned to AT&T-IS.[26]

11. NATA and ROLM next argue that, although the Commission cannot rule on contractual issues, we should invalidate the termination charge provisions of these contracts because they are inherently anticompetitive and inconsistent with the goals of the *CPE Detariffing Order*. NATA indicates that the threat of termination charges inhibits competition and effectively locks AT&T-IS's competitors out of a major portion of the CPE market (*i.e.*, that portion consisting of AT&T-IS's embedded customers subject to long-term leases). ROLM contends that the contracts were entered into at a time when there was no effective competition in the CPE market, and therefore these contracts are extending AT&T's past monopoly power into the present. AT&T-IS responds by noting that the Commission found that the CPE market was highly competitive in the *Second Computer Inquiry*. It also indicates that the fixed agreements, far from being inherently anticompetitive, are a standard commercial practice, and at the time they were executed were a proper response to the competitive market created by Commission decisions. AT&T-IS further argues that these contracts were subject to state regulation, were frequently challenged in state proceedings by the same parties challeng-

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[25] However, NATA does suggest that lack of privity between CPE lease customers and AT&T-IS, changed regulatory circumstances underlying the contracts, and the changed nature of the lessor (regulated BOC versus unregulated AT&T-IS) could lead the Commission to find the contracts were not binding on the customers. NATA Supplemental Comments at 7-9.

[26] AT&T-IS appears to have retreated from this position in a recent letter, noting that such issues could be resolved at the state level. *See* Letter from David J. Ritchie, AT&T-IS General Attorney, to Secretary, Federal Communications Commission (Jan. 23, 1985), at 3 (hereinafter *AT&T-IS January Letter)*.

ing them now in this proceeding, and in all such challenged cases were found by state PUCs not to be anticompetitive. Finally, AT&T-IS challenges the assertions by its competitors concerning the practical effect of the issue, arguing that a much smaller share of the overall multiline business CPE market is covered by these leases than these parties suggest.

12. NATA, ROLM, and the Equipment Distributors' Coalition (EDC) further argue that AT&T-IS's policy of waiving termination charges when a customer buys AT&T-IS new or embedded equipment is discriminatory and has an adverse impact on competition in sales of new CPE. NATA argues that AT&T-IS should not have any discretion to waive the early termination charges, but instead should be required to apply these charges uniformly in all circumstances. AT&T-IS contends that its current practices regarding the application of charges for early contract termination should not be overturned by the Commission because they are "normal competitive marketing practices,"[27] that are "consistent with the marketing and pricing practices of other vendors who lease equipment."[28] It further asserts that, while its competitors may be helped by a rule requiring that termination charges be applied in all cases, its CPE customers would not be. In particular, AT&T-IS argues that the application of a termination charge to a customer that purchases its in-place equipment would be unjustified (since AT&T-IS would be recovering the value of the equipment in the purchase price) and might possibly violate the provisions of the *CPE Detariffing Order*. Furthermore, AT&T-IS states that when a customer terminates a fixed contract to purchase new AT&T-IS equipment, the termination charge is not waived, but instead a partial credit is provided against the charge, which varies depending on the type of equipment subject to the lease, the period of time left to run on the lease, and the type of new equipment purchased. AT&T-IS argues that prohibiting it from giving credits on new equipment in these circumstances would amount to a substantial and inequitable restriction on its ability to compete in the CPE marketplace.

13. NATA, ROLM, and EDC contend, as a final point, that termination charges are providing a windfall to AT&T-IS in violation of the *CPE Detariffing Order*. They indicate that resale markets now exist for used CPE, which will allow AT&T-IS to obtain 40 - 60% of the new value of equipment surrendered by its customers who terminate their leases early. They also suggest that recent changes in depreciation rates for CPE and the availability of accelerated tax depreciation and tax credits will lead to an overrecovery by AT&T-IS of its investment in this equipment if full termination charges are imposed. They suggest that AT&T-IS is able to

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[27] *AT&T-IS June Letter, supra* note 12, at 4.

[28] *Id.* at 3.

use its windfall from overvalued termination charges to subsidize its sale of equipment to its embedded customers, which makes it the only party that can effectively sell new CPE to these customers. Furthermore, NATA and ROLM suggest that this excess recovery represents an unwarranted and unforeseen penalty on AT&T-IS's CPE customers and violates the protections provided for these customers in the *CPE Detariffing Order,* including the requirements limiting AT&T-IS's recovery to net book value. These parties suggest that the Commission should prevent this excess recovery by prohibiting the enforcement of termination charge provisions.[29] EDC requests that the Commission obtain more information to determine the extent of overrecovery and to provide a basis for ordering a reduction in the amount of the termination charges.[30]

14. AT&T-IS argues that imposition of the early termination charges is proper "because when a customer terminates service prior to the expiration of the term of the agreement, [AT&T-IS] will not achieve the investment and expense recovery contemplated and upon which the lower [lease rates] were predicated."[31] It challenges the relevancy and reliability of the analyses that purport to show an overrecovery of investment as a result of the application of termination charges and reiterates that the inclusion of such charges in long-term leases is a standard business practice.

IV. Discussion

15. In determining whether AT&T-IS's practices with respect to termination charge provisions of the long-term CPE leases violate the Communications Act or the policies established in the *CPE Detariffing Order,* we are presented with three questions. First, should we address the contractual issues of whether the CPE leases are valid, enforceable contracts that were properly assignable to AT&T-IS? Second, are the inclusion of termination charges in the CPE lease contracts, and AT&T-IS's waiver (or credit) practices, anticompetitive actions that are undermining competition in the CPE marketplace? Third, are termination charges and AT&T-IS's practices having an unfair, harmful impact on the

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[29] In its final pleadings, NATA recommends, as a middle ground, that the Commission declare that AT&T has achieved full capital recovery when 60% of a lease period is completed, and prohibit the application of termination charges from that point on, with pro-rata reductions in termination charges for leases not yet 60% completed. NATA attributes this alternative solution to an analysis presented by EDC. NATA Further Supplemental Comments (April 18, 1985) at 2, 10.

[30] EDC revised its position in a final filing and argued that sufficient information has been submitted and that the termination charges issue is therefore ready for Commission action. EDC recommends that the Commission eliminate the termination charge provisions from CPE lease contracts. EDC Supporting Information (March 27, 1985) at 1, 13.

[31] *Id.* at 2.

CPE lease customers who wish to terminate their leases prior to the expiration of the lease period? With respect to the first question, we concur with the parties who assert that issues such as the contractual status of the CPE leases and their assignability from the BOCs to AT&T-IS should be resolved at the state level. Regarding the second question, we have not been persuaded by the arguments presented against AT&T-IS's enforcement of CPE lease termination charges that the charges themselves or AT&T-IS's practices regarding them are anticompetitive in design or effect. With respect to the third question, we are unable to discern any unforeseen or inequitable impacts on the CPE lease customers stemming from termination charges. Therefore, we decline to take any action limiting AT&T-IS's ability to collect, or provide credits against, the termination charges. We also conclude, however, that it may be appropriate for there to be some limits on increases in the Tier B portion of the two-tier contracts after the expiration of the price predictability program we established in the *CPE Detariffing Order*. We propose that AT&T-IS limit increases in the Tier B rates (after price predictability has ended) to increases in the CPI, and we indicate in this Order that we will be issuing a Public Notice requesting comments on this proposal.

A. Contractual Issues

16. All parties agree that under our ancillary jurisdiction, we have the authority to rule on questions of whether AT&T-IS's actions violate the Communications Act or our previous orders.[32] However, several parties have argued that we do not have the authority to resolve contractual questions of validity and assignability, which must be settled on the basis of state law. AT&T-IS, in its early comments, opposed this position and argued that we should resolve these issues, but in more recent comments it appears to have abandoned this opposition.[33] Without passing on the question of our authority to decide these contractual issues, we agree that, in the circumstances presented in this proceeding, it would be appropriate for us to defer the resolution of these issues to the states. The CPE leases, when entered into by the parties, were subject to the differing contract and regulatory laws of the various states. The principles defining the elements of a valid, enforceable contract and the conditions under which a contract can be assigned vary significantly among the states. The CPE leases in question were subject to requirements in state tariffs, which also may have varied considerably among the different jurisdictions. In addition, it appears that some of the lease documents bear a stronger resemblance to the traditional notion of a

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[32] *See CPE Detariffing Order* at paras. 23-26.

[33] *See supra* note 26.

"contract" than others,[34] and some of the leasing practices of the BOCs apparently varied from state to state and, in some states, from year to year.

17. We find, therefore, that state courts are better positioned than this Commission to determine whether, under applicable state law, these leases were valid, enforceable, and assignable contracts. We also find that it is not necessary to protect the goals of the *CPE Detariffing Order* for us, in effect, to preempt state law in this area and determine that a single set of assumptions about the contractual status of these CPE leases should apply.[35] Accordingly, in this Order we limit our decision to questions of whether the inclusion of termination charges in the CPE lease contracts transferred to AT&T-IS from the BOCs, and AT&T-IS's enforcement of such charges, violate the Communications Act or our existing orders, and we make no findings about the validity and assignability of the CPE lease contracts under state law.[36]

B. The Impact of Termination Charges on Competition in the CPE Market

18. The parties challenging the termination charges contained in the AT&T-IS CPE leases argue that such charges should be unenforceable because of their anticompetitive impacts in the CPE market. First, they contend that the termination charge provisions in the CPE lease contracts

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[34] At least one commenting party indicates that some percentage of the CPE lease customers entered into arrangements under tariff alone with no supporting documentation. Letter from Victor J. Toth, for the Society of Telecommunications Consultants, to Chairman, Federal Communications Commission (Dec. 10, 1984), at 2. NATA contends that, in referring to the tariffs, the BOCs avoided the use of the term "contract" in describing these arrangements. NATA Further Supplemental Comments (April 18, 1985) at 2. AT&T-IS asserts that most customers did obtain their CPE pursuant to actual signed contracts. *See AT&T-IS January Letter, supra* note 26, at 3. Whether, in a tariff environment, the absence of a written document would be a significant factor affecting the validity or assignability of the leases in question is the type of contractual issue whose resolution we are leaving to state courts or other appropriate state dispute-resolution fora.

[35] We are also concerned that imposing on the parties some "national" principles of law that might be at variance with the local law they relied on when making the contract could, in some instances, result in unforeseen consequences for the parties. For example, it may be the case that the leases in question are deemed assignable in most states, but not assignable in some others. Were we to make an affirmative ruling on assignability, following the majority practice, we could be creating obligations for some CPE customers that they never agreed to assume and that are inconsistent with the law on which they relied when they agreed to lease equipment from AT&T-IS.

[36] While we make no findings on the state contractual issues, we assume, in proceeding with our analysis of the federal issues raised by termination charges, that under state law these leases are valid, enforceable contracts that were properly assigned to AT&T-IS. We note further that nothing in the Communications Act or our previous orders provides a basis for a contrary finding on these contractual issues.

are inherently anticompetitive, in that they effectively foreclose AT&T-IS's competitors from the AT&T-IS embedded CPE market. Second, they contend that AT&T-IS's policy of waiving, or providing credits against, termination charges only when a customer buys embedded or new AT&T-IS CPE severely exacerbates this anticompetitive impact.

1. Competitive Impacts Inherent in the Termination Charge Provisions of the AT&T-IS CPE Leases

19. AT&T's provision of CPE through long-term contracts that contain termination charges has been a point of contention between AT&T and its competitors ever since AT&T first started to offer such contracts in the mid-1970's. NATA itself notes that its counsel was "personally involved in over twenty-five different state regulatory agency proceedings dealing with 'two-tier' and 'VTPP' fixed term CPE tariffs."[37] By the time we detariffed new equipment pursuant to *Second Computer Inquiry,* AT&T's long-term CPE leases with termination charges had been accepted by numerous state PUCs.[38] In addressing the anticompetitive effects of such contracts, the Rhode Island Public Utilities Commission found that "[t]he two-tier concept of pricing is not anticompetitive in nature and would not artificially enable the New England Telephone and Telegraph Company to maintain its dominant market position."[39] In reaching this conclusion, the Rhode Island Commission noted: "We find no authority which would exclude the telephone company from using market concepts which are in common usage in competitive markets and are currently used by its competitors in this market"[40] Other PUCs that examined the competitive effects of long-term CPE leases also found that they were not inherently anticompetitive.[41]

20. Moreover, the United States Court of Appeals for the Second Circuit determined that two-tier pricing was not anticompetitive.[42] In reversing a jury's finding that Southern New England Telephone's (SNET) offering of CPE pursuant to such contracts violated the antitrust laws, the court held: "SNET's use of the two-tier plan is no more

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[37] NATA Response to AT&T-IS Reply (Oct. 26, 1984) at 5.

[38] *AT&T-IS March Letter, supra* note 13, at 2.

[39] *New England Tel. & Tel. Co.,* 16 Pub.U.Rep.4th 379, 383 (1976).

[40] *Id.* at 381.

[41] *See Chesapeake & Potomac Tel. Co.,* Order No. 5874, Docket TT-76-18 (D.C. Pub. Serv. Comm'n, Apr. 29, 1977), *aff'd sub nom. Atlantic Tel. Co. v. Public Serv. Comm'n,* 390 A.2d 439 (D.C. 1978); *New York Tel. Co.,* 12 Pub.U.Rep.4th 446 (N.Y. Pub. Serv. Comm'n 1975), *aff'd sub nom. Tele/Resources Inc. v. Public Serv. Comm'n,* 58 App. Div. 2d 406, 396 N.Y.S. 2d 906 (1977, 3d Dept.), *motion for leave to appeal denied,* 43 N.Y. 2d 647, 403 N.Y.S. 2d 1025 (1978); *Southern New England Tel. Co.,* 17 Pub.U.Rep.4th 191 (Conn. Pub. Serv. Comm'n 1977).

[42] *Northeastern Tel. Co. v. American Tel. & Tel. Co.,* 651 F.2d 76 (2d Cir. 1981), *cert. denied,* 455 U.S. 943 (1983).

anticompetitive than Northeastern's practice of selling PBXs. . . [and] both are 'ordinary marketing methods available to all in the markets'."[43] Finally, at the time these contracts were entered into, long-term repayment plans were common among AT&T's competitors, and AT&T's introduction of leases was a response to competition.[44] We agree, therefore, with the state commissions and courts referred to above that the long-term CPE leases, and their termination charges, are not inherently anticompetitive.[45]

21. We also find that while CPE leases may deter a lessee from contracting with non-AT&T-IS suppliers of CPE, the resulting market "foreclosure" cannot properly be characterized as an anticompetitive

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[43] *Id.* at 93 (citation omitted). Eighty percent of American companies, including the majority of the Fortune 1000, used leasing to acquire $67 billion worth of capital equipment in 1983. Leasing is common in telecommunications because in many circumstances it is advantageous to the customer to lease, rather than purchase, new telecommunications equipment. Lee, *It's Time to Think "Leasing"*, North American Telecommunications Association, 1985 Telecommunications Sourcebook 51 (1985). Furthermore, the inclusion of termination charge provisions, similar to those in the CPE leases, is a common business practice in a wide variety of business leasing transactions. *See e.g., Telex Corp. v. International Business Mach. Corp.,* 510 F.2d 894, 920-21, 926 (10th Cir. 1975), *cert. dismissed,* 423 U.S. 802 (1975) (computer equipment leases that included charges for early terminations were "commonplace commercial agreements" and were an "ordinary marketing method"); *New York Tel. Co.,* 12 Pub.U.Rep.4th at 449 (citing *Telex v. IBM*) ("fixed term period payment plans [including termination charges] are not atypical of competitive markets"); *New England Tel. & Tel. Co.,* 16 Pub.U.Rep.4th at 381. *See also* Epes, *Equipment Leasing from the Lessee's Viewpoint,* in Equipment Leasing — Leveraged Leasing 205 (E.Fritch & A. Riesman 2d ed. 1980) (events that will prematurely terminate the lease may trigger a required termination payment to the lessor).

[44] As we noted in a previous order:

> A fairly common practice by the new vendors of terminal equipment was to enter into three, five or seven year periods of payment for the capital costs of a PBX (or shorter period for key systems) with the customer obligation thereafter limited to periodic maintenance charges. The practice contrasted with prevailing common carrier pricing arrangements. Under Bell System pricing practice, a uniform monthly charge was applied indefinitely for the entire duration of service. As part of its revised marketing program "to meet the competition" AT&T introduced a new pricing concept applicable to the competitive terminal equipment field. This new concept was termed the "Two-Tier Contract Plan."

Customer Interconnection, First Report, 61 FCC 2d 766, para. 248 (1976).

[45] We have had previous opportunity to review similar long-term CPE contracts in our decision on AT&T's Dataspeed 4540 tariffs. AT&T Revisions to Private Line Service Tariff FCC No. 260 and Dataphone Digital Services Tariff FCC No. 267, Memorandum Opinion and Order, Transmittal No. 13583 (released Feb. 20, 1981). In that Order we found that the provisions for termination charges filed by AT&T for certain equipment then tariffed at the federal level "are not unlawful on their face and do not warrant rejection." *Id.* at para. 15.

consequence of the CPE lease contracts. Rather, any such foreclosure is little different from that occurring anytime a supplier leases or sells any piece of equipment to a customer. As the court noted in *Northeastern Tel. Co.*: "[i]t is reasonable to suppose that one who has just made his first Tier A payment is unlikely to buy a Northeastern PBX. But the incentives influencing his decision are no different than those operating on one who has just bought any other consumer item, a new car, for example."[46]

22. Furthermore, the extent of this foreclosure may not be as great as AT&T-IS's competitors suggest. In its comments, EDC relies on 1981 and 1982 data in estimating that 50% of the U.S. key system and PBX installed base is under long-term contracts to AT&T-IS. However, AT&T-IS has indicated that its estimates show that, as of January 1, 1984, only 21% of the U.S.-installed PBX base and 6% of the U.S.-installed key system base were under its CPE lease contracts.[47] In addition, AT&T-IS states that of these contracts, "approximately 20 percent expired in 1984, 61 percent will have expired by the end of 1985, 69 percent will have expired by the end of 1986 and 95 percent will have expired by the end of 1987."[48] Thus, it would appear that the vast majority of business CPE users are not subject to any restraints from AT&T-IS leases on their ability to obtain new PBX or key systems. In any event, customers under leases are free to contract with any supplier once their CPE lease contracts with AT&T-IS have expired. And while the customers may be constrained in their purchase of CPE during the term of their leases, these constraints are ones they explicitly agreed to when they entered into their original contracts with a BOC.

2. Competitive Impacts of AT&T-IS's Application of the Termination Charge Provisions

23. Moving next to the issue of AT&T-IS's enforcement of the termination charge provisions of the CPE lease contracts, several parties have objected to AT&T-IS's policy of waiving termination charges (or providing credits) only when a customer purchases AT&T-IS's new or embedded CPE, and fully enforcing such charges if a customer purchases non-AT&T-IS equipment.[49] These parties allege that AT&T-IS's practices

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[46] *Northeastern Tel Co.*, 651 F.2d at 92.

[47] *AT&T-IS March Letter, supra* note 13, at 3.

[48] *Id.* (footnote omitted).

[49] NATA also makes the contractual argument that the original CPE leases were made within a regulatory environment that would have precluded the BOCs from imposing termination charges in a discriminatory manner. Therefore, it argues that, since the BOCs could not assign to AT&T-IS rights greater than those they themselves possessed, AT&T-IS does not have the right under the contracts to impose termination penalties selectively. We are unable to accept this argument for two reasons. First, contentions about what rights the BOCs had under local contract and regulatory law and what could be assigned to AT&T-IS by the BOCs raise contractual questions of the sort we have already indicated are outside the scope of this decision. Second, even if we were to direct

are having a significant anticompetitive effect in the CPE market. They argue that the CPE lease contracts were entered into at a time when AT&T had monopoly power in the CPE market and these contracts are now one of the last vestiges of that power. The parties contend that the application of credits to offset early termination charges constitutes an immense control of the embedded base and will allow AT&T-IS to migrate its embedded customers to its new equipment, thus perpetuating present market power into the future.[50] They also maintain that one of the keys to this strategy is the alleged overvaluation of termination charges.[51] They suggest that AT&T-IS is using its "windfall" from termination charges to lower prices of its new equipment, making it very difficult for AT&T-IS's competitors to compete effectively in making sales to AT&T-IS's embedded CPE customers. These parties further note that, as long as AT&T-IS is allowed to recover termination charges, this subsidy will exist and AT&T-IS's competitors will be disadvantaged. Therefore, they contend that only by eliminating, or at least reducing, the termination charges in the AT&T-IS leases will we effectively return competition in the CPE market to "a level playing field."

24. As an initial point, we note that AT&T-IS's practice of waiving termination charges when a customer wishes to buy its in-place equipment is not unreasonable. When AT&T-IS sells in-place equipment to a customer, it fully recovers its invested capital from the purchase price and a termination charge is not required to complete capital recovery. Indeed, we agree with AT&T-IS that the imposition of such a charge might well deter customers from buying their in-place equipment, in a manner that would be inconsistent with the sales plan established in the *CPE Detariffing Order*. Therefore, for sales of in-place equipment, AT&T-IS's waiver policy is fully consistent with our detariffing plan.

25. With respect to AT&T-IS's practice of providing credits against termination charges when a customer buys new AT&T-IS equipment, we begin our analysis with a finding that such a practice could not be deemed anticompetitive in the absence of specific evidence that competition was being adversely affected. When AT&T-IS provides its customers who wish to upgrade their systems with credits to offset termination charges,

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AT&T-IS to apply termination charges uniformly, such a requirement would have little economic significance. AT&T-IS retains complete discretion to set prices for its new CPE at any level it wishes. We are not currently regulating these prices, nor do we intend to do so in the future. We find that it would not be consistent with the deregulatory principles of the *CPE Detariffing Order* to establish in effect a price control program for new AT&T-IS equipment. Thus, were we to require that AT&T-IS impose termination charges on all customers and not provide credits, AT&T-IS would be able to achieve similar results by lowering its prices for new equipment.

[50] *See* IDCMA Comments (July 26, 1984) at 4.

[51] *See infra* paras. 30-41.

it is promoting the sale of its new equipment and is merely adopting policies commonly employed by other companies. AT&T-IS is not engaging in blatantly anticompetitive practices, such as price fixing, that we would prohibit without the need for a showing of their actual impact on the marketplace. Thus, in reviewing the propriety of AT&T-IS's actions, we must consider whether competition in the CPE market has been, or is being, undermined by AT&T-IS's termination charge policies.[52] In examining the existing information on the CPE marketplace, we are unable to uncover any signs that AT&T-IS's actions are undermining competition or extending past market power into the future.

26. A review of recent market information[53] indicates that the telecommunications market for PBXs and key systems is very competitive. Over the past three to five years, AT&T-IS's share of new shipments in the key and PBX markets has markedly declined.[54] In addition, as a result of the large number of new entrants in both the retail and manufacturing portions of the key and PBX markets, and improvements in technology, prices have been driven dramatically downward.[55] A significant result of this competition has been a major decline in AT&T-IS's share of the U.S.-installed PBX and key system base.

27. The single most important factor in assessing the competitiveness of the current PBX and key system markets is the distribution of new equipment shipments. Estimates of AT&T-IS's market position in shipments of new PBX and key systems indicate that in 1984 AT&T-IS's share

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[52] In the proceedings in this docket, we have "vigorously pursued a policy of promoting competition in the CPE marketplace," and our continuing objective is to encourage the development of competition. *CPE Detariffing Order* at para. 2 (footnote omitted).

[53] It is important to remember that the market shares quoted herein reflect all of AT&T-IS's customers. The number of customers with two-tier and VTPP contracts under review in this proceeding would represent a much smaller percentage of the total market. As we noted previously, AT&T-IS estimates that as of January 1, 1984, 21% of the U.S.-installed PBX base and 6% of the U.S.-installed key system base were covered by AT&T-IS embedded CPE lease contracts with termination charges; and these percentages have almost certainly decreased since then as the market continues to grow and the leases continue to expire. *See supra* note 47 and accompanying text.

[54] In a recent article, an official from Northern Business Information, Inc. ("NBI") noted that AT&T's market share has been deteriorating for some time, and since deregulation AT&T has made "very little progress" overcoming manufacturing problems. Bartolick, *The Changing Landscape*, Computer World, Dec. 31, 1984- Jan. 1, 1985, at 53.

[55] *See* Newton, The Boom in Key Systems, Teleconnect, August 1984, at 69; *Rivalry Is Fierce in Growing Market for Telephone Switching Systems*, Wall Street Journal, February 10, 1984, section 2, col.3; North American Telecommunications Association, 1985 Telecommunications Sourcebook 65, 68, 73-74 (1985) (hereinafter NATA Sourcebook).

of the PBX market was between 19%[56] and 26%,[57] and its share of the new key system market was between 25%[58] and 33%.[59] These market share estimates show a decline for AT&T from past years when its estimated share of the new PBX market was 45% in 1980 and 32% in 1982,[60] and its estimated share of the new key equipment market was 58% in 1980 and 48% in 1982.[61] Moreover, in the PBX and key system markets, AT&T-IS is no longer the dominant company or, according to some industry sources, even the market leader. The Eastern Management Group estimates that in 1984 the leading firm in the new PBX sales market was Northern Telecom, followed by AT&T and Rolm.[62] In addition, an NBI analysis of the 1983 PBX new sales market indicates that for PBXs under 100 lines the largest seller by far was Mitel,[63] and for PBXs over-400 lines, the largest seller was Northern Telecom.[64] In the 1984 key/hybrid market, the largest seller apparently was TIE/Communications, followed by AT&T and ITT.[65] These figures provide a strong indication that the market for new PBXs and key systems is a highly competitive one and vendors are not being restrained from competing with AT&T-IS. If, as some parties in this proceeding suggest, AT&T-IS's termination charge practices are designed to drive its competitors out of the market and reestablish its dominance over CPE supply, it appears, at least thus far, to have been a singularly unsuccessful effort.

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[56] Sack, *Competition Is Tough, Margins Are Slim, But Vendors Still Flock To PBX Market*, Communications Week, April 1, 1985, at C1, col. 2. This market share estimate from the Eastern Management Group is based on shipments of lines in the PBX market.

[57] NATA Sourcebook, *supra* note 55, at 77. This market share estimate is based on shipment of instruments in the PBX market.

[58] Feldman, *KTS Market Seized by TIE, ATT, RBOCs*, MISWeek, Feb. 27, 1985, at 25, col. 1. This market share estimate from Marketing Program and Services Group is based on shipments of lines in the key/hybrid market.

[59] NATA Sourcebook, *supra* note 55, at 72. This market share estimate is based on shipments of instruments in the key system market. Key systems behind PBX/Centrex systems are included in the key market.

[60] *Id.* at 77.

[61] *Id.* at 72. The NBI estimate of 1982 market share, based on percentage of lines shipped was 44%. Friesen, *The Key System Market Race*, Teleconnect, August 1984, at 80 (hereinafter *Market Race*).

[62] Sack, *Competition Is Tough, supra* note 56, at C1. The market shares of the five leading firms are estimated as follows: Northern Telecom 21.2%, AT&T 18.9%, Rolm 18.4%, Mitel 10.2%.

[63] The market shares of the four leading firms in this market segment are estimated as follows: Mitel 34.4%, ROLM 13.2%, AT&T 10.1%, Siemens 9.6% Friesen, *PBX Market Analysis*, Teleconnect, Sept. 1984, at 117. These NBI market share estimates are based on shipments of lines.

[64] *Id.* at 118. The market shares of the leading firms in this market segment are estimated as follows: Northern Telecom 27.6%, AT&T 26.4%, ROLM 11%. In the 100 to 400 line PBX market segment, AT&T was the leader with a market share of 32.4%, followed by ROLM (17.6%) and Northern Telecom (14.5%). *Id.* at 117.

[65] Feldman, *supra* note 58, at 25. The market share estimates were TIE with 33%, AT&T with 25%, and ITT with 12%.

28. A further indication of the competitiveness of the PBX and key systems markets is the large number of manufacturers and distributors competing in the marketplace. On the manufacturers' side, there were more than 80 firms producing PBXs and key systems in 1983.[66] The companies competing with AT&T in the manufacture of PBXs and key systems include ROLM, (a wholly-owned subsidiary of IBM), Northern Telecom, Mitel, ITT, NEC, and Siemens. These are major international companies with substantial financial, technical, and marketing resources.[67] On the distributors' side, there were over 2000 interconnect firms selling multiline business CPE in 1984.[68] Moreover, as NATA notes, with the BOCs reentering the market as vendors of CPE, even more companies will be competing for sales.[69]

29. One consequence of the increase in competition has been a marked decrease in the prices of key systems and PBXs, which one observer has described as an "almost complete collapse of the pricing structure of the marketplace."[70] Another, somewhat less visible, consequence of the increase in competition has been the erosion in AT&T's share of the U.S.-installed base of key systems and PBXs. NATA estimates that in 1980 equipment provided by AT&T represented 75% of the U.S.-installed key system base and 61% of the U.S.-installed PBX base.[71] By 1983 these

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[66] *CPE Detariffing Order* at para. 4 n.8. In the PBX market, "[a]fter accounting for the big three [AT&T, Northern Telecom and ROLM] there are 14 vendors with significant market shares (over 1% of the total), . . . in addition to a third tier of vendors that has yet to earn any significant share of the market." Bartolik, *supra* note 54, at 53.

[67] A significant competitive development in both the PBX and key system markets has been the rapid growth of foreign competition. NBI indicates that in 1983, 8 of the 17 top PBX manufacturers, accounting for 45% of new shipments, were foreign firms. *Id.* at 54. In the key system market, approximately 50% of the new shipments in 1983 were from foreign manufacturers. *Market Race, supra* note 61, at 80.

[68] U.S. Department of Commerce, 1985 Industrial Outlook 30-4 (1985). Of course, in a vigorously competitive marketplace not all firms will be successful. It is quite possible that, as the rate of growth in this marketplace levels off, there will be a "shakeout" in which some of the more than 2000 firms that entered the market during a period when AT&T and the BOCs were, for the most part, not selling CPE may leave the market or fail. Such a result is not unusual in an industry in which there has been rapid growth, and by itself is no indication that competition in the market is failing. *See* Bartolik, *supra* note 54, at 52-53.

[69] "As the BOCs and AT&T-IS reach their stride in 1985 and 1986, competition will reach an intense pitch. . . ." NATA Sourcebook, *supra* note 55, at 65. Typically, the BOCs, like the interconnect companies, are marketing CPE produced by one or more of AT&T-IS's competitors.

[70] *See* Bartolick, *supra* note at 54, at 54.

[71] NATA Sourcebook, *supra* note 55, at 68, 74 (percentage of the market by installed instruments).

installed base shares were estimated to have deteriorated to 62% and 49%, respectively, and for 1984 they were estimated to have declined further to 57% of the key system base and 45% of the PBX base.[72] This steady decline in AT&T's share of the installed base reflects the competitive forces at work in the key system and PBX markets,[73] and indicates that any remnants of market power AT&T may have possessed in the recent past are quickly dissipating.[74]

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[72] *Id.* These percentages represent AT&T-IS's installed base, and include both AT&T-IS's embedded base and new sales since Jan. 1, 1983. Therefore, AT&T-IS's embedded base represents a smaller percentage of the U.S. installed base than these shares would indicate. The embedded base subject to long-term contracts would represent a still smaller percentage.

[73] "Few growth stories can match that of the interconnect equipment industry which started at ground zero little more than a decade ago and has expanded into a $2 billion industry today. . . . Year after year during the past decade suppliers have continued to carve out a progressively larger share of the sales of business instruments." *Interconnect Interests Increase Market Share*, Communications News, January 1982, at 29.

[74] We note that the arguments made by AT&T-IS's competitors that the CPE leases derive from a period when AT&T-IS exercised dominant control over the CPE marketplace appear to be substantially overstated. AT&T-IS states that the "overwhelming majority" of the contracts at issue in this proceeding were entered into no earlier than 1981. *AT&T-IS March Letter, supra* note 13, at 3. In 1980 in our *Final Decision* in the *Second Computer Inquiry*, we found that "[t]here are multiple vendors for almost any type of equipment desired, and customers are free to select equipment that best suits their needs." *Final Decision* at para. 143. We further determined that "the terminal equipment market is subject to an increasing amount of competition as new and innovative types of CPE are constantly introduced into the market by equipment vendors." *Id.* at para. 141. Based on these conclusions, we decided that tariff regulation was no longer the most efficient means to provide CPE. *Id.* at para. 140. Our view of the state of competition at this time is corroborated by industry observers, *see, e.g., New glamour for the office PBX*, Business Week, April 13, 1981, at 122-23 (describing "burst of new competition" in PBX market with major firms entering and capturing market share from AT&T), as well as the market share data discussed above which show AT&T with shares of the new PBX and key equipment market that by 1981 were approximately 40% and 50%, respectively, and declining rapidly. *See supra* paras. 26-27. Thus, when the CPE leases in question were entered into, most customers who chose to contract with a BOC had the options of buying or leasing equipment from other vendors. While some parties assert that the competition that existed in urban areas had not fully reached more remote locations, *see* EDC Comments, App. A at 21-22, they also acknowledge that these leases were all subject to tariff regulation at the state level. *See* EDC Comments at 10 ("All tariff terms were subject to strict regulatory control by the PUCs prior to divestiture.") As discussed above, these leases were often challenged by AT&T-IS's competitors in state regulatory proceedings, and their terms reflect active regulatory oversight and not the unfettered market power some parties suggest. Furthermore, both urban and rural customers had the opportunity to enter into month-to-month arrangements with AT&T (which were also subject to state regulation), and many chose to do so. Approximately 30% of the PBXs and key systems that were available for lease from the BOCs under fixed-term contracts were leased by customers on a month-to-month basis. *See* AT&T Response to Request for Information (Oct. 7, 1983), App. G. The fact that many customers chose to enter into long-term CPE lease contracts with lower monthly

C. The Effects of AT&T-IS Termination Charge Practices on CPE Lease Customers

1. Overvaluation

30. We are also unconvinced that the termination charge provisions in the CPE leases should be altered because the CPE lease customers are being harmed by AT&T-IS's enforcement of those provisions. EDC, NATA, and ROLM argue that AT&T-IS's recovery of termination charges is allowing it to recoup revenues in excess of any economic loss it may suffer from the termination of the contracts and that such charges "vastly overcompensate ATTIS for its costs of furnishing CPE under its fixed-term lease arrangements."[75] They claim that this overcompensation is at the direct expense of AT&T-IS's CPE lease customers, who are being charged more than equitable principles would dictate.[76] NATA and ROLM argue that this overrecovery requires us to eliminate the termination charges, or at least reduce them significantly. EDC, on the other hand, suggests that we should obtain more information to determine the extent of any overrecovery AT&T-IS may be achieving.

31. Three important assumptions underlie the parties' argument that AT&T-IS's enforcement of the termination charge provisions of the long-term CPE leases is providing AT&T-IS with revenues in excess of its actual economic loss from early termination.[77] First, they argue that the long-term contracts assume that equipment will have zero residual value at the time the lease is terminated and therefore do not provide the lessee

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rates and greater price stability is not sufficient reason to find that these leases were a means of perpetuating market power. Finally, in light of the apparent steady decline in AT&T-IS's shares of both new shipments and the installed base in these markets during the period these leases were being executed, the injury complained of by the commenters, that AT&T-IS is perpetuating an historic monopoly, does not appear to be supported by the facts.

[75] EDC Comments at 1.

[76] It is somewhat ironic that, in state rate hearings, AT&T's competitors, including some parties participating in this proceeding, argued that Tier A rates were too low reflecting artificially low investment figures, and thus, were non-compensatory. *See New England Tel. and Tel. Co.*, 16 Pub.U.Rep.4th at 383; *New York Tel. Co.*, 12 Pub.U.Rep.4th at 451.

[77] To illustrate this argument, EDC includes as an addendum to its comments an analysis of a hypothetical two-tier contract that is terminated prior to the end of the contract period. This analysis purports to show that AT&T-IS's collection of the full amount of the termination charge results in a 34% overrecovery of AT&T's original capital investment in the equipment. Bethesda Research Institute, *Customer Premises Equipment; Example of Lack of Cost Justification for Termination Charges in ATTIS' Embedded PBX Contracts* at 3 (January 1985) (hereinafter *BRI Issue Analysis*). AT&T-IS, in a review of the assumptions and methodology of the EDC analysis, states that there is actually underrecovery of the original capital investment, even with a termination charge. Letter from David J. Ritchie, AT&T-IS General Attorney, to Secretary, Federal Communications Commission (Feb. 21, 1985, Attachment at 1-2) (hereinafter *AT&T-IS February Letter*).

any opportunity to recover any residual value through reduced termination charges. Second, the parties contend that a resale market now exists which, in some cases, will allow used CPE to be sold for 60% of the list price of new CPE. Third, they argue that AT&T's use of faster depreciation rates recently provided for in our rules, and the availability of advantageous tax depreciation and investment credit provisions in the Internal Revenue Code, reduce the cost of equipment to AT&T-IS, but are not reflected in reduced lease rates for the equipment or in termination charges. The parties contend that these extra revenues allow AT&T-IS to recover a portion of its investment through means other than lease rate payments by lessees, and therefore the recovery of termination charges is extra revenue to AT&T-IS.

32. First, the argument that the long-term CPE leases contain no provision for reuse at the end of the contract may be incorrect for a large number of CPE lease contracts. AT&T-IS notes that "approximately 80 percent of the 49 jurisdictions in which AT&T-IS received embedded CPE, had two-tier tariffs that generally provided for some reuse or termination credit."[78] This credit was provided either through an explicit requirement that AT&T reduce the termination charge by the amount of resale, or through the recovery of some capital in the Tier B portion of the tariff, which was not subject to termination charges.[79] Thus, it would appear

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[78] *AT&T-IS March Letter, supra* note 13, at 1-2.

[79] AT&T-IS notes that while in most states the capital recovery under Tier B was small, in Illinois, Tier B was designed to recover in excess of 30 percent of the capital expenses. *Id.* at 2 n.4. In response, EDC argues that the Illinois tariff was probably the "bellwether" that set the national cap for Tier B lease rates under the price predictability program established in the *CPE Detariffing Order*, and that the resulting Tier B rates, inflated by the inclusion of capital expenses, lead to further overrecovery by AT&T-IS. EDC Supporting Information (March 27, 1985) at 8-9. EDC's allegation is unpersuasive for a number of reasons. First, EDC's argument is really an objection to setting national lease rates based on 70% of the highest state tariff. But we recently upheld that feature of the price predictability program in the *CPE Detariffing Reconsideration*, a proceeding in which EDC did not participate, and hence EDC's objection is untimely here. Second, it is not clear, in any event, that the Illinois tariff included the highest Tier B rate in the nation; other states might have approved higher maintenance expenses that, even without the inclusion of any capital recovery, resulted in higher Tier B rates than those in Illinois. Third, as indicated above, the price predictability program established a national lease rate that did not exceed the higher of 70% of the highest state tariff in effect for the particular category of equipment on March 29, 1983, or the median state tariff on that date. After AT&T established initial lease rates, any rates below the national cap could be increased to that level but only incrementally, in three steps spaced eight months apart, and those above the national lease rate had to be immediately lowered to that level. *See supra* para. 5. Therefore, if the Illinois tariff fell into this latter category, then some, perhaps all, of the capital recovery portion in Tier B rates would have been eliminated, resulting in underrecovery, *not* overrecovery. Finally, as noted in the text, termination charges are based on Tier A rates and, therefore, if any portion of capital expenses is included in the Tier B rates, the termination charges would be lower

that, for two-tier CPE lease customers in most states, the termination charge is already reduced in a manner similar to that suggested by EDC, NATA, and ROLM. Furthermore, AT&T-IS indicates that the VTPP CPE lease contracts did, as part of the underlying methodology, include provision for reuse or resale.[80] Generally, such contracts have lease terms of from two to four years, and the monthly charges to customers were set to recover less than the full capital investment by the end of the lease term. Therefore, these VTPP contracts do not require that termination charges be reduced by the amount realized from reuse, as the amount received by AT&T-IS in the event of termination by the customer implicitly takes into account some residual value for the equipment.

33. Second, regarding the resale market, it is not clear to what extent a resale market has developed for used AT&T-IS equipment.[81] No substantial resale market for used AT&T CPE existed previously, and while AT&T-IS has entered into a contract with CMI Corporation to develop a program to resell its equipment, how successful that program will be is still an open question.[82] Moreover, there are costs for refurbishing, marketing, and reselling the equipment, which must be considered in determining the return to AT&T-IS from this program,[83] as well as the extent to which a resale market has developed for used AT&T-IS equipment. Given the steady decline in prices for new equipment in this market,[84] and the speed with which technology has brought about

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for these leases. This would not result in overrecovery by AT&T-IS and could contribute to an underrecovery AT&T-IS may experience on two-tier leases that customers terminate early. *See infra* para. 36.

[80] *Id.* at 1.

[81] According to one industry source, the extent to which the equipment is economically reusable depends on three conditions: (1) the equipment must be physically reusable in the engineering sense; (2) it must be profitable to the supplier to make the adjustments the used equipment requires for another customer; and (3) there must be a market for the used equipment as opposed to new equipment. Selwyn, *Sifting Out the Economic Cost of Terminal Equipment Services*, Telephone Engineer and Management, Oct. 15, 1979, at 63-64.

[82] AT&T-IS launched a trial program in October 1984 for used Horizon key systems. The trial program for used PBX equipment was scheduled to begin in February 1985. CMI is acting as a consultant to AT&T-IS in establishing the resale program targeted for sale by computer stores and interconnect companies. *AT&T Entering Used PBX Market*, Communications Week, Jan. 14, 1985, at 38, col. 3. Prices for this used equipment have not yet been set. *See AT&T-IS & The Used Market For Its Old Key & PBXs*, Teleconnect, Nov. 1984, at 138.

[83] The analysis of a hypothetical two-tier contract prepared by the Bethesda Research Institute and filed by EDC indicates that AT&T-IS would only receive 15% of list value for a piece of CPE as its share of the resale revenue. Moreover, this estimate assumes that used equipment could be sold for 60% of its list value, and not some lesser amount. *BRI Issue Analysis, supra* note 77, at App. A. ROLM suggests that resale value of used equipment may only be 40% of its new value. ROLM Comments at 11-12.

[84] *See supra* note 70 and accompanying text.

improvements at lower costs, it cannot be assumed that this resale market is, or ever will be, a major force in providing overrecovery for AT&T-IS.[85]

34. Third, with respect to the alleged overrecovery because of the acceleration in depreciation schedules provided in our rules, the parties argue that the Commission's actions reducing equipment service lives and adopting remaining life depreciation[86] allowed AT&T-IS to recover its CPE investment at a faster rate than was assumed when the leases were executed. They then conclude that as a result of this "unanticipated depreciation," AT&T-IS has already recovered its investment in most CPE subject to fixed-term leases, rendering the application of termination charges as windfall for AT&T-IS.[87] AT&T-IS contends that the parties making this argument misapprehend the regulatory cost recovery practices applicable to the CPE fixed-term leases. It asserts that the BOCs received revenues under such leases in excess of depreciation schedules, but only wrote down the equipment based on those schedules, which resulted in local ratepayers receiving substantial benefits from these contracts prior to the transfer to AT&T-IS. AT&T-IS summarizes this situation as follows:

> Fixed term agreements were based on faster capital recovery than the FCC actually prescribed; ratemakers recognized the additional revenue not as recovery but as a contribution to local service costs. Local service ratepayers thus received a "windfall". After depreciation acceleration, commissions recognized more capital recovery and less contribution, but the booked capital recovery was still less than the contracts contemplated.[88]

35. Based upon our analysis of the effects of depreciation on AT&T-IS's recovery of revenues from the CPE lease contracts, we conclude that AT&T-IS's analysis more accurately reflects what actually occurred. EDC apparently assumes that the regulatory depreciation periods and the contract periods for the CPE in question were identical. But this in general, was not the case, and typically the former was longer than the latter, with the result that there was a mismatch between regulatory and contractual capital recovery. To the extent that our prescription of reduced equipment lives allowed AT&T to increase, in a given year, its regulatory depreciation expense for CPE under long-term contracts, this

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[85] Furthermore, to the extent that AT&T-IS is able to develop a successful resale market for some types of used equipment, this would not be inconsistent with the deregulatory plan we established in the *CPE Detariffing Order. See infra* paras. 39-41.

[86] *See* Property Depreciation, Report and Order, 83 FCC 2d 267 (1980), *modified on reconsideration*, 87 FCC 2d 916 (1981); Prescription of Revised Percentages of Depreciation (AT&T), Order, 88 FCC 2d 1223 (1982). Remaining life depreciation is an accounting technique that allows a firm to reflect a changed depreciation life for an asset by depreciating the remaining net book cost of the asset over the remainder of its estimated life.

[87] EDC Comments at 14.

[88] *AT&T-IS February Letter, supra* note 77, Attachment at 1 (footnote omitted).

increase merely reduced a contribution many of AT&T's CPE lease contracts were providing to other services.

36. For example, consider a five-year, two-tier contract for an electronic PBX (the type of contract EDC analyzes to support its claim of overrecovery by AT&T-IS).[89] The average equipment life for regulatory depreciation purposes for such a PBX was approximately 8 years.[90] Thus, in each year 20% of the cost of the equipment would be recovered from the contract customers,[91] but only 12.5% of its cost would be treated as depreciation expense for regulatory purposes (i.e. included in the carrier's revenue requirement and deducted from the asset's net book value). The difference between the contract payment and the depreciation expense recognized on the regulatory books would be available as a contribution for other telephone company services.[92] In 1981, when the Commission reduced equipment lives to 7.5 years (for a representative electronic PBX) and adopted remaining life depreciation,[93] this difference was reduced,

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[89] EDC Comments, Addendum. The majority of two-tier contracts had terms of from three to seven years, (*see AT&T-IS March Letter, supra* note 13, at 2), so EDC's selection of a five-year contract as fairly representative of an average two-tier lease appears reasonable.

[90] *See, e.g.,* Prescription of Percentages of Depreciation Pursuant to Section 220(b) of the Communications Act of 1934, as Amended, Michigan Bell, FCC 80-641, Mimeo No. 28428 (released Nov. 18, 1980); New England Telephone, FCC 78-889, Mimeo No. 4909 (released Jan. 11, 1979); Cinncinati Bell, FCC 79-798, Mimeo No. 15103 (released Dec. 17, 1979).

[91] For the sake of simplicity, this analysis (like EDC's) assumes a straight-line capital recovery under the contract, even though there would be an interest component included in the Tier A rate and, as with a mortgage or other series of fixed payments with an interest and principal component, more principal would be recovered in later years than in earlier years. This assumption does not alter the conclusions drawn from the example in the text.

[92] This mismatch between depreciation expenses and contract revenue recovery can be illustrated by examining the contract analyzed by Bethesda Research in an Addendum to EDC's Comments. *See BRI Issue Analysis, supra* note 77. Using the assumptions of that analysis, a Dimension 400 PBX with a cost of $16560 was leased pursuant to a five-year, two-tier contract. An electronic PBX, like the Dimension 400, would have had an average equipment life of approximately 8 years for depreciation purposes. Under this contract, if we assume straight-line capital recovery, *see supra* note 91, $3312 was recovered from the customer for capital recovery in the first year of the lease, but only $2070 was included for depreciation expense. Thus, this contract provided a $1242 contribution for non-CPE services. This difference would reverse itself after the Tier A portion of the contract expired. The capital recovery payments under the contract would then be zero, but there would still be depreciation expense associated with that piece of CPE included in the carrier's revenue requirement. Of course, Tier A is still in effect for all the two-tier leases that are the subject of dispute in this proceeding. And with the deregulation of CPE, there is no longer any regulatory revenue requirements in which unrecovered depreciation expense can be included, after Tier A expires. This is a potential source of underrecovery, not overrecovery, by AT&T-IS as the result of the transfer of the leases and the deregulation of CPE.

[93] *See supra* note 86.

but not eliminated.[94] The lease payments did not increase, although the amount of the contribution available from the contract for other services was smaller.[95] Moreover, as a result of this mismatch of contract revenues and depreciation expense, when divestiture and detariffing occurred, most of the equipment subject to fixed-term leases had depreciation remaining that exceeded the revenue stream that would be provided by the contracts.[96] Thus, the change in depreciation rates for CPE also had the effect of reducing the gap between the net book value of the CPE subject to fixed-term leases (which was the value attributed to the equipment for the purpose of the transfer to AT&T-IS) and the remaining payments under the leases at the time of transfer. But this change did not eliminate that gap and, contrary to the assertions of EDC and NATA, is not a source of overrecovery of CPE investment by AT&T-IS.[97]

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[94] Employing the same EDC example described above, *see supra* note 92, let us assume that at the start of year-2 of the lease, the equipment life for the average piece of equipment similar to a Dimension 400 was reduced from 8 years to 7.5 years and remaining life was adopted. The depreciation expense on a $16,560 piece of equipment would increase from $2070 to $2229 and a net subsidy from the contract of $1083 would still exist. (We obtain $2229 by depreciating the net book value of the CPE (14490 = 16560 - 2070) over its remaining life of 6.5 years.)

[95] EDC's analysis of these contracts appears to contain a number of errors. First, as discussed above, it fails to recognize that the regulatory depreciation period could be different from, and generally was longer than, the contract period. Second, it assumes that the depreciation changes we prescribed resulted in a 25% increase in depreciation recovery for CPE, an estimate that appears to be too high for most electronic CPE, which was the type of CPE offered under fixed-term leases. (The increase in the annual regulatory depreciation expense in the example discussed *supra* note 92, is 7.7%.) Third, EDC applies its increased depreciation factor to the lease payments, which were unaffected by the depreciation changes, rather than to the regulatory depreciation expense for the CPE, which was affected by those changes (as shown above). This is simply incorrect and leads to various conclusions that are inaccurate (*e.g.*, that during the Tier A period, there was a contribution from other regulated services to CPE lease contracts, when in fact for most contracts the opposite was the case) and anomalous (*e.g.*, that by increasing depreciation rates, we allowed AT&T to recover 125% of its investment in CPE subject to leases that were not terminated early).

[96] Following the previously discussed example, (*see supra* note 92), assume at the end of year-4 of the contract, divestiture and detariffing occurred. At that time, AT&T-IS received a piece of equipment that had a net book value of $7803 (original value of $16560 minus accumulated depreciation of $8757), but with remaining lease payments of only $3312. Moreover, had the customer terminated at that time, with one year remaining on the contract, and not paid termination charges, AT&T-IS would have received no additional revenues and suffered a potential loss of $7803.

[97] As an additional point, some parties seem to assume that this CPE is still subject to our depreciation rules and that, by continuing to use the "accelerated" methods available in those rules, AT&T-IS is reaping an ever-increasing overrecovery. We do not understand this argument. As a result of the implementation of the deregulatory plan we adopted in the *CPE Detariffing Order*, our depreciation rules do not apply to the CPE now owned

37. Furthermore, we fail to discern any overrecovery deriving from AT&T's use of accelerated tax depreciation and investment tax credits.[98] With respect to the former, in the *CPE Detariffing Order*, we found that AT&T-IS will be liable for deferred taxes on transferred equipment as a result of the BOCs having depreciated the CPE at a faster rate for tax purposes than for book purposes and having normalized the difference. These taxes will be payable by AT&T-IS in the latter part of the life of the CPE when depreciation charges for book purposes exceed those available for tax purposes or when CPE book basis exceeds its tax basis when it is sold. Accordingly, we ordered the deferred tax reserves transferred to AT&T-IS together with the associated CPE. As we explained in the *CPE Detariffing Order*, "[t]he deferred tax reserves . . . will not provide any cash to make these payments to the Treasury, but they will provide ATTIS with an accounting entry against which to charge those payments rather than charge them against income."[99] Thus, we fail to see how the deferred tax reserves, which represent the tax liability AT&T-IS inherited from the BOCs as a result of the CPE transfer, reflect any overrecovery of investment on AT&T-IS's part.[100]

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by AT&T-IS and have no bearing on CPE lease rates (which were in all cases set prior to deregulation) or the manner in which AT&T-IS depreciates the equipment on its financial books (which is now subject only to the constraints of generally accepted accounting principles and other applicable requirements concerning financial reporting). AT&T took a significant writedown on this equipment on its financial books after divestiture because it considered the actual economic value of the CPE to be substantially below the net book value at which it was transferred. *See* AT&T News Release (Oct. 19, 1983).

[98] Pursuant to the "normalization" requirements of the Internal Revenue Code (the "Code") and the applicable Treasury Regulations, state PUCs required the BOCs to flow through benefits of both these types of tax savings to ratepayers over the period the equipment was depreciated. This flow-through was accomplished by reducing the rate base by the amount of the deferred tax reserves and reducing tax expense by an amortized amount of the investment tax credits. *See CPE Detariffing Order*, App. A. Thus CPE lease rates, which included amounts to recover a return on rate base and tax expense, would typically reflect these tax savings to the extent permitted by the Code. No party has suggested otherwise in this proceeding.

[99] *Id.* at App.A, para. 31. We recently upheld the transfer of the deferred tax reserves to AT&T-IS in the *CPE Reconsideration Order* at paras. 78-84.

[100] In its later comments, EDC puts a slightly different gloss on its tax contentions by characterizing deferred tax reserves as permanent tax savings, and not simply tax deferrals, and arguing that as such they have provided AT&T with excess recovery on CPE. *See* EDC Supporting Information (March 27, 1985) at 4-8. As EDC recognizes, however, this characterization is flatly inconsistent with the "normalization" approach to accounting for the benefits of accelerated depreciation, which requires the creation of deferred tax reserves to account for the future tax liability arising from the difference between tax and book depreciation rates. Thus, EDC's argument is simply that the tax normalization methods themselves have permitted an overrecovery of investment by AT&T. We find this proposition unsound for a number of reasons. First, we note that the characterization of deferred tax reserves as permanent tax savings and the

38. Regarding investment tax credits, we concluded in the *CPE Detariffing Order* that the transfer of the unamortized tax credits associated with the transferred CPE would allow AT&T-IS to reduce its book tax expense but not its actual tax liability, and that it would not receive any extra cash. Furthermore, AT&T-IS would appear to be responsible for any recapture of investment tax credits that occurs as a result of sale of CPE earlier than provided in Section 47(a) of the Internal Revenue Code.[101] Thus, as with accelerated depreciation, we fail to see how the use by the BOCs of investment tax credits provides AT&T-IS with overrecovery of the investment in this CPE.

39. In any event, even if AT&T-IS would achieve additional revenue from the equipment covered by CPE lease contracts, such revenue

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corresponding rejection of normalized tax accounting have been criticized by a number of commenters, including the economist retained by EDC to perform a study of AT&T-IS's recovery of investment in leased CPE. *See* W. Bolter & D. Irwin, *Depreciation Reform: A Crucial Step in Transforming Telecommunications to a Free Market* 191-200 (1980) (failure to normalize tax benefits of accelerated depreciation undermines investment incentives intended by Congress and creates financial risk for utilities from failure to recognize future tax liability); *see also* D. Kiefer, *Accelerated Depreciation and the Investment Tax Credit in the Public Utility Industry: A Background Analysis* 102 (The Nat'l Regulatory Research Inst. Occasional Paper No. 1, 1979):

> This argument [that deferred taxes are really permanent tax savings] is largely one of semantics. Taxes deferred because of accelerated depreciation are, of course, eventually paid. However, in a growing firm, when the previously deferred taxes come due new larger tax deferrals are being received; thus, the deferred tax account grows rather than shrinks. This may create the casual impression that the taxes are deferred forever and never paid. If this were really the case, however, the deferred tax account would grow even more rapidly, its growth being undiminished by the repayment of previously deferred taxes. The deferred tax account continues to grow despite repayments just as any account of items which continuously roll over—accounts payable, accounts receivable, outstanding loan balances, etc.—will grow in a growing firm.

Second, the authorities relied on by EDC are vestiges of a policy debate that was resolved (in a manner contrary to the position EDC endorses) for non-regulated companies by the accounting profession in AICPA Accounting Principles Board, Opinion No. 11 (requiring normalized treatment of accelerated depreciation as part of generally accepted accounting principles) and for regulated companies by the Congress in the Tax Reform Act of 1969 (requiring normalized tax accounting by regulated utilities). Thus, the normalization of accelerated depreciation taken on CPE by the BOCs, which gave rise to the deferred tax reserves EDC finds objectionable here, was required by the Internal Revenue Code (as well as by implementing Treasury, FCC, and state PUC regulations) and any alleged "overrecovery" provided thereby was one that Congress clearly intended to be available to regulated companies when they make investments in productive assets. *See generally CPE Detariffing Order*, App. A.

[101] 26 U.S.C. § 47(a)(1984). For most CPE, the required holding period to avoid recapture is seven years for property placed in service prior to 1981 and five years for property placed in service after 1980. *Id.* at App. A, para. 46 n.80.

recovery is exactly what the CPE lease customers agreed to when they made their decision to enter into a contract with AT&T rather than going with a month-to-month arrangement or buying from an AT&T competitor.[102] Furthermore, such recovery is perfectly consistent with our detariffing plan for AT&T's embedded CPE. In the *CPE Detariffing Order,* we decided to use net book value as a surrogate for real economic value when we required AT&T to remove the embedded CPE from regulation. We also decided to require AT&T-IS to sell embedded CPE to in-place customers who wish to purchase their equipment. We declined, however, to set specific prices for multiline CPE, although we did limit AT&T-IS's recovery from the multiline base to aggregate net book value. We concluded that ratepayers are protected by requiring that the embedded base be offered for sale to in-place customers at prices that will not generate revenues to AT&T-IS in excess of net book value (plus reasonable transaction costs). This mechanism gives ratepayers an opportunity to receive the benefit of any gains in value through their purchase of the in-place equipment.

40. We refused to require further disaggregation of the embedded base to provide AT&T-IS with a degree of flexibility in establishing sale prices for various types of equipment, subject to the requirement that overall sales revenues from multiline CPE not exceed its aggregate net book value. That is, AT&T-IS was permitted to price certain portions of the embedded base below net book value based on its judgment that doing so would be an effective means by which sales to in-place users could be achieved. These sales would result in some return on investment, whereas, if the product line were required to be priced at net book value, the likelihood of sales would be decreased and losses would be greater. Similarly, AT&T-IS was permitted to price other portions of the embedded base above net book. Gains realized from these sales would partially offset the losses from sales of CPE at less than net book value and from equipment AT&T-IS was unable to sell at all, and thus would aid in the achievement of capital recovery. We conclude that any additional value AT&T-IS might achieve from some of its CPE subject to the lease

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[102] When the CPE lease customers decided to accept the lower long-term contract rates, they agreed to be bound for a specific period and to pay a termination charge if they cancelled the lease prior to the end of that period. The situation is analagous to that of an investor who puts a sum of money into a certificate of deposit (CD) to receive a higher interest rate than is available with a demand account. If this investor were to withdraw funds from the CD before it matures, there would typically be an interest penalty, but such a penalty is not generally regarded as unfairly disadvantaging the investor by locking him in to the CD or providing a windfall to the bank. Nor is it generally suggested that a change in the performance of the bank's investment portfolio, which allows it to earn more money, is a relevant factor that should cause the bank to allow the customer to cancel the CD, before it matures, without a penalty.

contracts (whether as the result of the development of a resale market or otherwise) is revenue which will help to offset losses from that part of the embedded CPE base that has little economic value and substantial net book value.[103]

41. We conclude with respect to the issue of overrecovery for AT&T-IS of its capital investment under long-term fixed contracts that: (1) the possibility of a resale market is not a sufficient factor to cause a major reevaluation of these contracts; (2) other alleged elements of AT&T-IS's overrecovery are not fully substantiated on the record; and (3) in any event, we anticipated that the plan established in the *CPE Detariffing Order* would allow AT&T-IS to recover more than the net book value of some types of CPE, but that, in the aggregate, the ratepayers are protected. Furthermore, elimination or reduction in termination charges would be somewhat unfair to those customers who entered into month-to-month arrangements with AT&T to preserve their flexibility. These customers paid a significant sum of money each month to retain the ability to switch to alternate suppliers. To allow long-term lease customers the same flexibility without requiring that they pay for it would be inequitable to those who did pay the higher amount, and might well provide a basis for a claim of discrimination by these customers. Therefore, based on these considerations, we shall take no action to eliminate or alter the calculation of termination charges in the AT&T-IS CPE leases.

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[103] While the plan we adopted in the *CPE Detariffing Order* is fair to ratepayers in the aggregate, it could result in different cost impacts for various affected parties. Such cost impacts are relevant factors for us to take into account in our decision-making; however, in and of themselves, they do not predetermine the decisions we should reach, and we have broad discretion to give equal or greater weight to other policies and objectives. The United States Court of Appeals for the District of Columbia Circuit recognized this broad discretion in its review of our access charge decision. In response to an argument by Aeronautical Radio, Inc. (ARINC) that airlines would face an eightfold increase in monthly charges for business service at FX open ends as a result of our access charge decision, the Court indicted that:

> We must also point out that it is possible both to accept the accuracy of ARINC's portrayals of the cost impact about to hit the airlines and to dismiss that consideration as irrelevant. . . . ARINC could not seriously argue that the impact upon a single industry of the FCC's vast and ambitious reworking of the communications industry's rate structure could in any way affect the outcome of our review. There are winners and losers galore as a result of the FCC's plan. . . . It is certainly not within the scope of this court's review to seize upon the impact on a single industry as a reason for returning the FCC to its drawing board.

Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1095, 1147 (D.C. Cir. 1984), *cert. denied,* 53 U.S.L.W. 3583, 3595 (U.S. Feb. 19, 1985) (No. 84-95).

2. *Tier B Issues*

42. As a final issue, NATA argues that those customers who entered into two-tier and VTPP contracts with a BOC were contracting for a regulated service subject to the terms and conditions of tariffs on file with state regulatory agencies. It further argues that as a result of our decision detariffing AT&T's embedded base and preempting the states' regulatory authority over CPE, such contractual customers no longer receive the regulatory protection that was an important element of their decision to contract with a regulated entity. NATA therefore concludes that it is incumbent upon the Commission, as the entity that supplanted the PUCs as the CPE regulatory authority, to provide protection to customers who are bound to AT&T-IS by termination charges and who are not receiving the benefits of the regulatory protection they relied on.

43. With regard to CPE lease customers who signed VTPP contracts, the removal of state regulatory protection would seem to have little or no impact on their contractual relationship with AT&T-IS. These customers entered into contracts that contained a fixed price, not subject to change by AT&T-IS, and a termination charge based on that price. The contracts contain the benefits of regulation within their four corners and thus are not affected by the elimination of state tariffs. The CPE lease customers who entered into two-tier contracts, on the other hand, are in a somewhat different position, in that these contracts explicitly refer to state tariffs for their Tier B rates. The state tariffs referenced in Tier B are no longer in existence because of detariffing and, as a consequence, two-tier customers can no longer rely on state regulatory authorities to establish the level of Tier B charges. Since detariffing, these Tier B rates have been subject to the limitations of the price predictability program we established in the *CPE Detariffing Order*. However, after the expiration of price predictability on December 31, 1985, AT&T-IS will be free to set Tier B charges solely at its discretion. For those customers who remain bound to AT&T-IS by the termination charge provisions in Tier A of their contracts, it is possible that their Tier B lease rates could be significantly increased, and they would be unable to switch to alternative suppliers.

44. One potential solution to the problem we have raised would be for AT&T-IS to limit increases in Tier B rates (in those two-tier contracts in which Tier A has not expired by the end of price predictability) to some neutral indicator such as increases in the Consumer Price Index (CPI). If AT&T-IS wished to raise the Tier B rate in a particular contract by an amount greater than the increase in the CPI, it could do so by waiving the termination charge provision of that contract. We offer this proposal as one possible solution to the problem we have identified; however, because there has only been a very limited record on this issue, we will shortly issue a Public Notice inviting interested parties to comment on our

proposal and to offer alternative proposals that address the issues we have raised. We will resolve this issue in a subsequent order in this docket before the expiration of our price predictability program.

V. Ordering Clause

45. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by Independent Data Communications Manufacturers Association, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Construction Permit, Extension of
Construction Permit, Transfer of

Where permittee did not commence construction of two TV stations within time permitted and waited until after permits were cancelled to inform FCC that it wanted to assign them, denials of extension application upheld. Decision to assign construction permit should be made as soon as possible so assignee has time to construct without needing to ask for an extension.

David E. Goff

Del. Auth. 85-04

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

April 26, 1985

Mr. David E. Goff Route 10 Sparta,
Tennessee 38583

Re: Station
KOBK(TV)
Walla Walla,
Washington
BMPCT-850124KE

Station KKSG(TV)
Carlsbad,
New Mexico
BMPCT-850124KG

Dear Mr. Goff:

On February 12, 1985, the Chief, Video Services Division denied the above-captioned applications for extensions of time in which to construct Stations KOBK(TV), Channel 14 in Walla Walla, Washington, and KKSG(TV), Channel 25 in Carlsbad, New Mexico. This is with respect to your March 14, 1985, petitions for reconsideration of those actions. Both applications for construction permits were granted on July 25, 1983, and you had until January 25, 1985, in which to complete construction. On January 24, 1985, however, you sought extensions of time in which to construct both stations. Before an extension application can be granted, Section 73.3534(a) of the Commission's Rules requires either a specific and detailed showing that the failure to complete construction within the time provided was due to causes beyond a permittee's control or that there are other matters sufficient to justify the extension. Your applications showed that no equipment had been ordered and that no construction had commenced at either station, and you estimated that construction could not be completed before June 30, 1986. The only reason you offered for your failure to construct was that you were seeking additional financial resources. On February 12, 1985, the Division pointed out that, in your applications for construction permits, you certified that sufficient funds were available to construct and operate the stations, and it found that your decision to seek other financing was a business judgment and not a cause beyond your control. Moreover, the Division was unable to find that there were any other matters which would warrant a grant of additional time to build either station. Accordingly, both extension applications were denied, the construction permits were cancelled, and the call signs were deleted.

In support of your petitions for reconsideration, you now contend that you have been in contact with individuals who have expressed an interest in purchasing the construction permits, and you request extensions of time in which to finalize the contracts of sale and to file the appropriate assignment applications. You further state that neither station will require as much time to construct as previously believed, and you estimate the date of completion of both stations as December 31, 1985. In some circumstances, extension applications have been granted if a proposed purchaser makes a firm commitment to construct. Here, however, no assignment application has been filed, and there has been no commitment on the part of either prospective purchaser. Moreover, it is well established that an extension application will not be granted simply to permit an applicant to seek an assignee in order to recoup out-of-pocket expenses. *MG-TV Broadcasting Co. v. F.C.C.*, 408 F.2d 1257 (1968); *Continental Summit Television Corp.*, 27 F.C.C. 2d 945 (Rev. Bd. 1971). The Commission expects the construction of a television station to be completed within 18 months — whether by the original grantee or an assignee. If the permittee becomes unable or unwilling to build and decides to assign the construction permit, it is expected to file an assignment application as promptly as possible so that the assignee will have sufficient time to construct without requiring an extension of time. The filing of an assignment application, however, does not automatically entitle the permittee to an extension of time to have the station built. As the decision to assign is delayed until further into the construction period without significant construction having been undertaken, the public interest in allowing an assignment diminishes. This is because it becomes apparent that the assignee will be unable to complete construction during the prescribed period and that assignment of the permit may, therefore, no longer be the quickest way to get the station built. Here, you waited until after your construction permits had been cancelled to inform the Commission that you were negotiating to assign them, and the assignment applications still have not been filed. Meanwhile, you have made no effort to construct either station. Finally, you estimate that construction could not be completed in any event before December 1985, indicating that yet additional applications for extensions of time must be filed. We, therefore, remain of the opinion that you have failed to demonstrate that circumstances beyond your control prevented construction or that "other matters" warrant grant of the extensions. Accordingly, your petitions for reconsideration ARE DENIED.

Sincerely,

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

Frequency Assignment, Table of Assignment FM
Table of Assignments

Action adding FM allotments to 689 communities in accordance with criteria designed to maximize the number of communities and consistent with established allotment criteria for new service. —*FM B/C Assignments*
MM Docket No. 84-231

FCC 84-640

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments.	MM Docket No. 84-231

FIRST REPORT AND ORDER

Adopted: December 19, 1984; Released: January 14, 1985

BY THE COMMISSION:

Introduction

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 49 Fed. Reg. 11214, published March 26, 1984, listing 684 communities as proposed locations for new FM channel allotments. In addition, 224 counterproposals for 189 communities were accepted for consideration by *Public Notice* of July 23, 1984.[1] The *Notice* generated a response of over 2,500 comments pertaining to a variety of matters.[2] Most pleadings were filed for the purpose of expressing an interest in applying for a channel at one or more of the listed communities. In this *First Report and Order* we direct our attention to the list of 689 communities (Appendix A) receiving new FM allotments and explain the

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[1] The *Public Notice* established a reply comment period listing the original communities and the counterproposals accepted for consideration. Of the original communities, 82 were removed from the list since we failed to receive a comment expressing an interest in applying for a channel at those communities.

[2] A substantial number of late comments were also filed. These untimely submissions have not been accepted for consideration.

process and policy determinations used to select among the communities in conflict. We shall, in the very near future, decide the other matters raised in this proceeding: (1) special treatment for daytime-only AM licensees which apply for FM channels in the same community; (2) the time periods established for filing applications for these newly allotted channels; and (3) lifting the restrictions on filing petitions for new FM allotments.

Background

2. This omnibus proceeding was the first step toward implementing the Commission's action in BC Docket 80-90, *Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments*, 94 FCC 2d 152 (1983), *recons.* 49 Fed. Reg. 10260, published March 20, 1984, wherein, at para. 80 of the *Report and Order*, the Commission determined that a large scale rule making was contemplated in order to respond to requests for new FM allotments and to expedite service in the most prompt fashion. In effectuating the large scale proceeding, the Commission developed a list of 684 communities determined to be in need of service by focusing attention on four factors[3]:

(1) first local service
(2) first fulltime local service
(3) provision of minority service
(4) provision of public radio service

The allotment of channels for these communities was to be undertaken with the aid of a specially designed computer program which could resolve multiple conflicts by weighing selective criteria. Since it is inevitable that not every community could be allotted a channel, the program was designed to search for channels for the optimum number of communities. For example, wherever a choice could be made between granting new allotments to two cities instead of one, the larger number was to be chosen. In addition, the selection between conflicting proposals on a one-to-one basis was to be made by placing a greater priority on certain factors[4]:

(1) first or second aural service

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[3] The status of some communities has changed since the compilation of this list by the addition of an AM or FM station. However, rather than disqualify the community and deny a new service for which interest has been expressed, we have not dropped these communities from consideration. In each case we did change the category to the appropriate priority.

[4] As we stated in the *Notice*, these criteria were recently adopted by the Commission to evaluate conflicting proposals. See *Revision of FM Assignment Policies and Procedures* (BC Docket 80-130), 90 FCC 2d 88 (1982), *recons.* Mimeo No. 34675, FCC 84-282 released June 29, 1984, the companion proceeding to Docket 80-90.

(2) first local service

(3) first fulltime local service

(4) minority service

(5) public radio service.

Acceptance of Counterproposals

3. The *Notice* proposed to accept counterproposals based on certain technical and policy considerations. The counterproposal had to meet the distance separation requirements to add existing stations and vacant channels but also conflict with one or more of the original 684 proposals. In addition the counterproposal must state that service would be provided pursuant to one or more of the stated factors. In this regard, the Commission believed that no other type of proposal would succeed in a comparative analysis with proposals already meeting the listed criteria. The Commission was also interested in conducting the proceeding in an expeditious fashion. We affirm here the decision to limit the number of counterproposals that could be filed by the technical and policy methods used.

4. The Commission has received forty-four (44) objections styled as petitions for reconsideration pertaining to our failure to accept certain counterproposals not falling into the above categories. These requests have been considered as comments in the instant docket. Five counterproposals previously determined to be unacceptable are the subject of a *Further Notice of Proposed Rule Making* in this docket. In three of these counterproposals, the petitioner specified the provision of a first or second aural service which was an acceptable category.[5] However these requests also involved the desire of existing Class A stations to upgrade to a higher class of channel and have their licenses modified accordingly. The question of modifying licenses in the rule making context was unsettled during this period as a result of a pending Application for Review to the *Helena, Montana*, case, 50 R.R. 2d 70 (1982), *recons.* 48 Fed. Reg. 59025, published November 30, 1983, and no such requests were being considered. The Commission's policy was recently established in *Modification of FM and TV Station Licenses*, MM Docket 83-1148, 49 Fed. Reg. 34007, published August 28, 1984, enabling us to now consider requests which involve modifying a station's license to a higher class.

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[5] Three counterproposals involve channel substitutions at (1) LaCrosse, Wisconsin; (2) Corbin, Kentucky; and (3) Vergennes, Vermont. We have also accepted two other counterproposals for consideration — (1) South Pittsburg, Tennessee; and (2) Kinston, North Carolina — based on showings that resolved technical problems with these proposals.

Selection Factors

5. In order to provide for the computer application of the allotment criteria established in Docket 80-130, the *Notice* in this proceeding proposed the use of numerical weights for the established criteria. These weights were proposed as follows:

First aural service-4
Second aural service-3
First local service-3
First fulltime local service-2
Minority service-2
Public radio service-2

Where mutually exclusive proposals fit the same category the city with the greater population would be selected. Where a proposal fit into two or more categories an extra fraction of a point would be added to enhance the proposal's value. We received comments on the proposed numerical weighting factors which generally supported the proposed scheme. However, several commentors favored various alternatives.

6. The Daytime Broadcasters Association argued that first local service and first fulltime local service should be assigned equal priority to provide service to a larger population that already has daytime service. The National Association of Black Owned Broadcasters contended that minority service and first aural service should receive equal priority in order to give adequate weight to minority service and ownership. The National Black Media Coalition proposed assigning a value of "three" to minority or public radio service and a value of "two" for first local service in order to increase the likelihood of minority service in major population centers as opposed to the higher preference given to first local service.

7. In order to further increase the provision of minority service, one commentor suggested that where the Commission proposes to assign a new FM channel to a community which already has two or more radio stations, any subsequent counterproposal should be required to demonstrate that it will provide service to a minority population of equal or greater number and not merely a first or second aural service. Lastly, the Corporation for Public Broadcasting proposed extending the priorities in the allotment process to the licensing process, particularly in the case where public radio service is to be provided.

8. The preference for first local service has traditionally been given great weight in the allocation process. Thus the Commission's proposal in this docket included a list of cities where first local service was given considerable weight. We believe the use of this priority is particularly appropriate in developing this first list of communities made possible by rule changes promulgated in Docket 80-90. Additionally, and as proposed, other criteria including communities with daytime-only AM stations and those with minority or public radio needs have been singled out for

consideration according to their populations. Thus, the weighting system proposed in this proceeding has been used in formulating this list.

9. We note, however, that our primary goal in the allotment process is to provide the greatest possible service to the population as a whole and, thus, once this first set of new allocations is in place we may find it appropriate to give equal or subordinate weight to these factors given priority here. The FM Table, as amended, now lists communities large and small throughout the nation. Service is available, if desired, to virtually all Americans and we would assume that future table expansion will occur primarily in areas where population is sufficient to support additional entrants. Finally, we would note that the application process and not the allocation process appears to offer the greatest potential to solve problems raised by minority, public radio, and daytime-AM interests.

10. In allotting the channels herein we have found it unnecessary to set out in detail the specific issues raised regarding each channel allotment. Rather, we discuss in general terms, the most important matters raised. Basically if interest in operating a station at a proposed location was received, every effort was made to allot a channel. The general reasons that some communities were denied channels can be set forth in a few categories. First, the most favorable arrangement of allotments was attempted by optimizing the number of allotments that could be made. As noted in paragraph 2, *supra*, the optimization process applied to situations where two or more allotments could be made instead of one, regardless of other comparative merits. This optimization process caused some proposals to be denied even though they were not previously identified as being in conflict with another proposal. In many cases channel changes were made in order to resolve conflicts and provide each community with a channel. In other instances, channel changes were necessary in order to lessen or change the direction of a site restriction.

11. Second, the weighting factors discussed above were used to resolve mutually exclusive proposals. In all of those cases, a search for alternate available channels was made. The majority of denials was caused by preferring one community over another based on this process. Third, a small number of proposals were denied for a variety of reasons unrelated to comparative criteria or optimization arrangements. The causes consisted of such things as (1) the failure to establish community status for a counterproposal[6]; (2) the failure to demonstrate city grade service due to distant site restrictions;[7] (3) the failure to show that for communities over 300,000 population, a Class A channel could provide

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[6] In general, if the community was listed in the U.S. Census, community status was presumed. If no listing was found, then additional indicia were needed.

[7] For those cities listed in Appendix C which are too large to receive predicted city grade coverage from a Class A channel, the Commission would reconsider upon a showing that

adequate coverage to the entire community, or (4) the grant of an application specifying a conflicting site during the pendency of this proceeding.[8] A list of the communities denied channels and a brief reason for the denial is set forth in Appendix C.

Miscellaneous

12. Commentors raised several other matters worthy of discussion. In view of the Commission's determination that some communities could benefit from the addition of a public radio service, supporters requested that some commercial allotments should be reserved exclusively for noncommercial educational use. However, such a practice is rarely approved in allotment proceedings. In fact, the Table of Allotments lists only four examples. In these instances the reservation was premised on the impact of a nearby TV Channel 6 station or the preclusive constraints of Canadian and Mexican allocations. With the recent action taken in Docket 20735 concerning TV Channel 6 - FM Noncommercial Educational interference standards (adopted October 26, 1984),[9] the content of such showings is now settled and can be considered in future contexts. The allotments granted herein are available for application as noncommercial educational stations in all cases. The comparative need for this type of programming versus commercial programming is more appropriately determined in the hearing context. For the above reasons we have not reserved any channels in this proceeding.

13. Similarly no channels have been specifically reserved for minority service as requested by some commentors. The priority to be given to such service is a matter more appropriately considered in the hearing process where the relative priorities could be evaluated. On the other hand, the absence of an expressed interest in providing minority service did not disqualify a community previously identified to receive an additional allotment for that reason. The opportunity to obtain a minority service was the applicable consideration and the availability of a channel for this purpose was the intent behind the proposal.

14. The majority of unacceptable counterproposals were returned because they involved a Class A station desiring to upgrade. The Commission generally favors such increases in service.[10] However, an increase in coverage for an existing station is usually not of the same import as the provision of new local service. We have nevertheless treated such proposals as comments and attempted to allot alternate channels

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the proposal would not eliminate an allotment made herein to a higher weighted community.

[8] In this regard *see* Public Notice of March 27, 1984, pursuant to which we attempted to solve such conflicts by finding alternate channels.

[9] *Third Report and Order*, 49 Fed. Reg. 45146, published November 15, 1984.

[10] See *Modification of FM and TV Station Licenses*, MM Docket No. 83-1148, *supra*.

than those proposed in order to accommodate the desire of those stations to upgrade in the future. Finally, where commentors requested the allotment of a higher class of channel than that proposed in the *Notice*, we attempted to do so with due regard to the comparative weighting system and the optimization process.

15. *REGULATORY FLEXIBILITY FINAL ANALYSIS*

I. Reason for Action

This action derives from BC Docket 80-90 which greatly increased the availability of channels. In this proceeding we have evaluated comments supporting and opposing proposals for FM channel allotments throughout the United States and have determined which communities have the greater need for the available frequencies.

II. Objective

To provide FM frequencies throughout the United States to meet the demand for new FM stations, particularly in those communities lacking aural service.

III. Legal Basis

Sections 303(r) and 4(i) of the Communications Act of 1934, as amended.

IV. Description, Potential Impact and Number of Small Entities Affected

Small entities may be affected in two ways. The increased availability of FM frequencies may benefit small entities, interested in applying for new stations. Many small entities have expressed this desire. On the other hand, increased competition from these new stations may adversely affect small entities already holding licenses. The comments submitted in this proceeding did not address how many small entities may be affected either favorably or adversely.

V. Reporting, Record-Keeping and Other Compliance Requirements

None.

VI. Federal Rules Which Overlap, Duplicate or Conflict With This Rule

None.

VII. Any Significant Alternative Minimizing The Impact on Small Entities and Consistent With the Stated Objective

None.

16. The Secretary shall cause a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance

with Paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 50 U.S.C. *et seq.*).

17. Accordingly IT IS ORDERED that Section 73.202(b) of the Commission's Rules IS AMENDED to include the communities as set forth in Appendix B.

18. Authority for the action taken herein is contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934 as amended.

19. IT IS FURTHER ORDERED, That the petition of the United Church of Christ, Office of Communication, *et. al.*, (RM-3245) IS DENIED.

20. IT IS FURTHER ORDERED That this action is effective February 20, 1985.

21. For further information concerning this proceeding contact the Allocations Branch, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

NAME	*CH*	*CL*	*SITE RESTRICTION (MILES)*	*(Km)*	*CONCURRENCE*
ALABAMA					
BAY MINETTE	293	A	1.6	2.6 W	
BRUNDIDGE	234	A			
CORDOVA	225	A			
DOTHAN	273	A	1.2	1.9 E	
ELBA	266	A			
EUTAW	282	A			
FLORENCE	241	A	3.2	5.1 S	
FT RUCKER	226	A			
HOMEWOOD	247	A	4.8	7.6 S	
LINDEN	275	A			
MONTGOMERY	241	A	3.1	5.0 W	
ORANGE BEACH	289	A	0.1	0.1 SE	
OXFORD	250	A			
SELMA	287	C2	14.9	24.0 SW	
TALLADEGA	248	A			
VERNON	293	A			
WINFIELD	290	A	4.1	6.7 SE	
ALASKA					Anchorage Monitoring Station
ANCHORAGE	225	C			
BETHEL	300	A			
ARIZONA					
BUCKEYE	295	A			Mexico
CHINLE	297	A			
FLAGSTAFF	275	C2	8.6	13.8 NE	
GLOBE	247	A			Mexico
KEARNY	286	A	1.2	1.9 S	Mexico
ORAIBI	252	A			
PARADISE VALLEY	290	A			Mexico
SAN CARLOS	279	A			Mexico
SIERRA VISTA	269	A	0.6	1.0 N	Mexico
TUBA CITY	250	A			
WINDOW ROCK	276	A			
YUMA	250	A			Mexico
ARKANSAS					
BEEBE	268	A	3.8	6.2 N	
BELLA VISTA	293	A			
CABOT	273	A			
CLARENDON	297	A			
DERMOTT	289	A	3.1	5.0 E	
EL DORADO	227	A			
ENGLAND	243	A	0.0	0.1 NW	
EUDORA	268	A			
GLENWOOD	283	A			

NAME	*CH*	*CL*	*SITE RESTRICTION (MILES)*	*(Km)*	*CONCURRENCE*
ARKANSAS (cont'd)					
HAMBURG	258	A			
HARDY	284	A	2.8	4.5 NE	
HELENA	233	A			
HORSESHOE BEND	293	A			
LITTLE ROCK	258	A			
MALVERN	268	A			
MARIANNA	295	A			
MARKED TREE	229	A			
N CROSSETT	274	A			
PINE BLUFF	267	A			
TEXARKANA	284	A	2.2	3.6 SW	
TRUMANN	294	A			
CALIFORNIA					
ATWATER	223	A	4.5	7.3 SE	
AVENAL	289	A			
BAKERSFIELD	257	A			
CATAGO	275	A			
CHINA LAKE	274	A			
CHOWCHILLA	227	A			
COLUSA	243	A	0.8	1.2 W	
CRESCENT NORTH	250	A			
E HEMET	277	A	4.6	7.4 SW	Mexico
E PORTERVILLE	263	A			
EARLIMART	265	A	0.2	0.3 NW	
FIREBAUGH	276	A	4.5	7.3 S	
FORD CITY	271	A			
GEORGE	264	A			Mexico
GONZALES	282	A	0.2	0.3 SE	
GRIDLEY	268	A			
HANFORD	233	A	4.5	7.3 SE	Mexico
IDYLLWILD	267	A	1.0	1.6 SE	Mexico
INDEPENDENCE	292	A			
KINGSBURG	292	A	3.9	6.3 S	
LAKE ISABELLA	283	A			
LENWOOD	285	A	4.2	6.7 SE	Mexico
LINDSAY	277	A			
LUCERNE VALLEY	293	A	0.2	0.4 NW	Mexico
MADERA	297	A	3.6	5.7 SW	
MC FARLAND	275	A			
MENDOTA	272	A	4.6	7.5 NE	
MERCED	299	A	0.3	0.4 E	
MODESTO	230	A			
MONTECITO	225	A			Mexico
ORANGE COVE	262	A	4.0	6.4 NW	
ORLAND	293	A	4.8	7.8 NW	
OXNARD	271	A	1.4	2.2 W	Mexico
RIO DELL	296	A	2.7	4.4 SW	

NAME	*CH CL*	*SITE RESTRICTION (MILES)*	*(Km)*	*CONCURRENCE*
CALIFORNIA (cont'd)				
ROHNERVILLE	263 A			
SACRAMENTO	278 A			
SALINAS	250 A	2.7	4.3 SE	
SAN JACINTO	241 A	2.6	4.1 NW	Mexico
SAN LUIS OBISPO	246 B1			
SANTA BARBARA	299 B1	2.2	3.5 W	Mexico
SEARLES VALLEY	283 A			
SEBASTOPOL	229 A			
SHAFTER	282 A	1.3	2.1 S	
SOLEDAD	287 A			
SOUTH OROVILLE	285 A	2.3	3.7 N	
VISALIA	241 A	4.2	6.7 SE	
WINTON	254 A			
COLORADO				
BRUSH	292 A			
LA JUNTA	295 A			
LAS ANIMAS	297 A			
PUEBLO	283 C1	10.0	16.1 SE	
CONNECTICUT				
EAST LYME	254 A	4.8	7.7 E	
ENFIELD	250 A			
LEDYARD	293 A			
LITCHFIELD	247 A	2.2	3.5 N	
PAWCATUCK	299 A			
SALISBURY	251 A			
SHARON	277 A	3.7	5.9 NW	
DELAWARE				
LEWES	290 A			
MILFORD	267 A	4.9	7.9 SW	
SELBYVILLE	250 A	4.7	7.5 SE	
SMYRNA	225 A	3.5	5.7 E	
FLORIDA				
ALACHUA	223 A			
CENTURY VILLAGE	286 A			
CHATTAHOOCHE	287 A			
CHIEFLAND	247 A			
EDGEWATER	226 A	0.7	1.2 NE	
ENGLEWOOD	290 A			
GIFFORD	234 A	2.2	3.6 SE	
GRACEVILLE	271 A	3.3	5.3 S	
GRETNA	264 A	2.9	4.6 SE	
HOLLY HILL	277 A			
KEY COLONY BEACH	288 A			

NAME	*CH CL*	*SITE RESTRICTION (MILES)*	*(Km)*	*CONCURRENCE*
FLORIDA (cont'd)				
KEY WEST	300 C1			
MARIANNA	227 A	1.1	1.8 S	
MONTICELLO	270 A			
ORLANDO	255 A	1.8	3.0 E	
PENSACOLA	291 A			
QUINCY	274 A			
SUMMERLAND KEY	275 A			
TALLAHASSEE	291 A	2.3	3.7 SW	
TICE	229 A	1.8	2.8 N	
WATERTOWN	289 A	0.9	1.4 NW	
GEORGIA				
ARCO	290 A			
ASHBURN	289 A			
CUTHBERT	264 A			
FT OGLETHORPE	239 A	4.9	7.8 S	
FT VALLEY	250 A	0.9	1.5 NE	
HOGANSVILLE	248 A	1.1	1.8 W	
IRWINTON	279 A	0.4	0.5 NE	
JEFFERSONVILLE	248 A			
LAKELAND	290 A	4.8	7.7 W	
LEESBURG	279 A			
LYONS	223 A	4.6	7.3 SW	
MABLETON	273 A			
MACON	222 A	4.4	7.1 SE	
MILLEDGEVILLE	264 A			
MILLEN	235 A	3.6	5.8 NW	
MONTEZUMA	223 A			
OMEGA	298 A			
REIDSVILLE	281 A	2.8	4.5 SE	
ROYSTON	279 A			
SPARTA	274 A			
STATESBORO	275 A	2.0	3.1 N	
SYLVESTER	271 A			
VALDOSTA	299 A			
HAWAII				
HONOLULU	290 C			
IDAHO				
AMERICAN FALLS	281 A			
GOODING	267 A			
HAYDEN	233 A			Canada
ILLINOIS				
BUSHNELL	284 A			
CARRIER MILLS	283 A	2.5	4.0 NW	
CARTERVILLE	236 A	1.8	3.0 N	

NAME	*CH*	*CL*	*SITE RESTRICTION (MILES)*	*(Km)*	*CONCURRENCE*
ILLINOIS (cont'd)					
CASEY	286	A			
CHAMPAIGN	262	B1	4.2	6.8 S	
COAL CITY	264	A			
DECATUR	226	A	2.3	3.7 SE	
DWIGHT	255	A			
EUREKA	253	A			
FARMINGTON	239	A	3.6	5.8 NE	
GALENA	298	A			
GALVA	273	A	0.3	0.4 E	
HENRY	263	A			
KANKAKEE	236	A	2.0	3.2 S	
MAHOMET	290	A	3.5	5.7 NE	
MARSEILLES	243	A	3.2	5.1 SW	
MARSHALL	290	A	4.2	6.8 W	
MORRISON	236	A	2.5	4.0 NE	
NASHVILLE	284	A			
NEWTON	295	A			
OREGON	291	A	3.1	5.0 NE	
PEORIA	222	A			
PINCKNEYVILLE	282	A	1.1	1.7 N	
POLO	299	A			
SPRING VALLEY	277	A	3.9	6.3 E	
WOODLAWN	295	A	3.8	6.1 NW	
INDIANA					
ANDERSON	254	A			Canada
ATTICA	239	A			
AUSTIN	242	A	2.0	3.1 N	
BERNE	230	A	4.1	6.6 SW	Canada
BICKNELL	289	A	4.4	7.0 SW	
BLOOMFIELD	266	A	1.5	2.4 SE	
CHARLESTOWN	282	A	2.9	4.7 N	
CLINTON	230	A			
CORYDON	243	A			
DELPHI	275	A			
EVANSVILLE	298	A	3.8	6.1 NW	
FORT BRANCH	268	A	4.3	6.8 N	
FT WAYNE	222	A	3.0	4.9 NW	Canada
MITCHELL	273	A			
MT VERNON	294	A	1.7	2.7 SW	
NAPPANEE	239	A	1.5	2.4 SW	Canada
NEW HAVEN	300	A	1.4	2.3 E	Canada
NEWBURGH	291	A			
NOBLESVILLE	230	A			Canada
ROYAL CENTER	241	A	2.6	4.2 W	Canada
SOUTH BEND	292	A	3.6	5.8 NW	Canada

NAME	CH	CL	SITE RESTRICTION (MILES)	(Km)	CONCURRENCE
IOWA					
BELLE PLAINE	239	A			
CRESCO	272	A	1.2	1.9 W	
DES MOINES	298	C2	2.7	4.3 S	
ELDORA	258	A	0.7	1.2 SW	
GRINNELL	294	A	3.0	4.8 W	
JEFFERSON	255	A	0.5	0.7 NW	
MANCHESTER	234	A			
NEW HAMPTON	236	A			
ROCK VALLEY	295	A	2.4	3.8 NE	
SAC CITY	286	A			
SIBLEY	262	A			
WINTERSET	239	A			
KANSAS					
AUGUSTA	242	A	1.3	2.1 NW	
FREDONIA	281	A			
GIRARD	266	A	0.6	1.0 SW	
HERINGTON	242	A			
KINGMAN	232	A			
MEDICINE LODGE	240	A			
NORTH FORT RILEY	273	C2	5.6	9.0 S	
OLATHE	222	A			
PLAINVILLE	244	A			
TOPEKA	223	A	4.5	7.2 N	
KENTUCKY					
BEAVER DAM	274	A			
BEREA	294	A			
BUFFALO	268	A			
BURKESVILLE	253	A			
CAVE CITY	294	A	2.1	3.4 NE	
CUMBERLAND	274	A			
EDMONTON	256	A	4.8	7.7 NE	
EMINENCE	289	A			
HARLAN	286	A			
HAWESVILLE	289	A			
IRVINE	291	A			
LANCASTER	286	A			
LAWRENCEBURG	271	A			
LEXINGTON-FAYETTE	283	C2	11.5	18.4 NE	
LOUISA	222	A			
LOUISVILLE	263	C2	15.4	24.8 SE	
MARION	274	A			
MIDWAY	300	A			
NICHOLASVILLE	264	A	3.8	6.1 SE	
RADCLIFF	278	A			

NAME	*CH*	*CL*	*SITE RESTRICTION (MILES)*	*(Km)*	*CONCURRENCE*
KENTUCKY (cont'd)					
SALYERSVILLE	247	A			
SHELBYVILLE	267	A	1.9	3.1 E	
SHEPHERDSVILLE	286	A	1.6	2.5 NE	
SPRINGFIELD	274	A			
VANCLEVE	260	A			
WHITLEY CITY	290	A	1.5	2.4 N	
WILLIAMSBURG	282	A			
WILMORE	242	A	4.4	7.2 S	
LOUISIANA					
ALEXANDRIA	289	A			
ARCADIA	223	A	3.6	5.8 SW	
BASILE	271	A			
BASTROP	277	A			
BERWICK	290	A	1.3	2.0 E	
BREAUX BRIDGE	243	A	1.5	2.4 SE	
BUNKIE	282	A	1.2	2.0 NE	
BURAS TRIUMPH	231	A	5.0	8.0 S	
COUSHATTA	222	A			
ERATH	225	A			
HOMER	260	A			
JONESVILLE	266	A	4.2	6.8 SE	
LAFAYETTE	238	A			
LAKE ARTHUR	297	A			
LAKE CHARLES	287	C2	14.7	23.6 SW	
LAROSE	262	A			
MONROE	287	C2			
NEW IBERIA	229	C2	9.7	15.6 SE	
NORTH FORT POLK	294	A			
OPELOUSAS	290	A			
RAYNE	294	A	4.8	7.7 NW	
RESERVE	235	A	0.4	0.7 SE	
RUSTON	258	A			
SHREVEPORT	279	A	4.7	7.6 E	
SOUTH FORT POLK	267	A	4.1	6.5 NE	
VIVIAN	239	A			
WASHINGTON	284	A	3.4	5.5 E	
MAINE					
DEXTER	271	A			Canada
FAIRFIELD	227	A	6.2	9.9 N	
MADISON	248	A	3.1	5.0 W	Canada
MEXICO	264	A	4.1	6.6 NW	Canada
PITTSFIELD	258	A	2.4	3.9 E	
TOPSHAM	238	A			Canada
VAN BUREN	251	A			Canada
WINSLOW	237	A			Canada

NAME	*CH*	*CL*	*SITE RESTRICTION (MILES)*	*(Km)*	*CONCURRENCE*
MARYLAND					
CRISFIELD	245	A			
POCOMOKE CITY	293	A			
SALISBURY	255	A			
WESTERNPORT	224	A			
MASSACHUSETTS					
ATHOL	260	A			Canada
GREAT BARRINGTON	286	A	1.6	2.5 S	Canada
ORANGE	247	A	2.3	3.7 NW	Canada
S YARMOUTH	280	A			
TURNERS FALLS	230	A			Canada
MICHIGAN					Allegan Monitoring Station
ALLEGAN	222	A	2.2	3.6 N	Canada
BENTON HARBOR	235	A	2.0	3.3 E	Canada
BUCHANAN	256	A	2.9	4.7 N	Canada
CARROLLTON	263	A	4.1	6.5 N	Canada
ESSEXVILLE	247	A			Canada
GRAND RAPIDS	255	A	1.8	2.8 NW	Canada
HARTFORD	279	A	4.5	7.2 N	Canada
KINGSFORD	255	A			Canada
MUSKEGON	300	A			Canada
OSCODA	239	C2	13.7	22.1 NE	Canada
PORTAGE	243	A			Canada
SAGINAW	283	A	0.7	1.0 S	Canada
SPRING ARBOR	295	A			Canada
STANDISH	245	A			Canada
VASSAR	255	A	4.7	7.6 NE	Canada
WALKER	263	A			Canada
WURTSMITH	235	A			Canada
MINNESOTA					
BABBITT	294	A	3.2	5.1 NE	Canada
CALEDONIA	234	A			
EDEN PRAIRIE	289	A			
GRANITE FALLS	230	A	2.9	4.8 W	
JACKSON	287	A			
LA CRESCENT	274	A			
LAKEVILLE	286	A	0.3	0.5 N	
LE SUEUR	241	A	4.5	7.2 NW	
MORA	237	A	0.3	0.4 NE	Canada
NEW PRAGUE	238	A	4.8	7.7 SW	
SLEEPY EYE	297	A			
SPRINGFIELD	289	A			
STAPLES	234	A			Canada
STEWARTVILLE	235	A			
TRACY	286	A			

NAME	*CH*	*CL*	*SITE RESTRICTION (MILES)*	*(Km)*	*CONCURRENCE*
MINNESOTA (Cont'd)					
TWO HARBORS	282	A			Canada
MISSISSIPPI					
BAY ST LOUIS	233	A	3.7	6.0 E	
BELZONI	225	A			
CLARKSDALE	243	A			
CLEVELAND	299	A	0.8	1.3 W	
COLUMBUS	235	C2	1.0	1.5 SE	
GREENVILLE	284	C2	10.4	16.7 E	
GREENWOOD	270	A			
HOLLY SPRINGS	235	A			
INDIANOLA	245	A			
LAUREL	251	A	4.8	7.7 SW	
LEXINGTON	373	A	0.2	0.3 N	
LUCEDALE	295	A			
MERIDIAN	271	A	2.7	4.4 SE	
MONTICELLO	271	A	1.4	2.2 N	
MOUND BAYOU	271	A	3.8	6.0 NE	
NATCHEZ	247	A			
STATE COLLEGE	282	A			
VICKSBURG	266	A	0.6	0.9 S	
WATER VALLEY	268	A	2.8	4.5 S	
WIGGINS	250	A			
YAZOO CITY	229	A	4.7	7.5 N	
MISSOURI					
AVA	290	A			
BONNE TERRE	282	A			
CASSVILLE	227	A			
CHAFFEE	284	A			
CHARLESTON	291	A	0.6	1.0 NE	
CUBA	271	A			
KIRKSVILLE	300	C1	11.0	17.6 S	
LAMAR	260	A	4.9	7.8 S	
MT VERNON	294	A			
PERRYVILLE	294	A	0.1	0.1 S	
REPUBLIC	258	A	1.3	2.1 NE	
RICHMOND	223	A			
SOUTHWEST CITY	262	A			
SPARTA	243	A			
ST JAMES	258	A			
WARRENTON	260	A	1.0	1.6 SE	
WASHINGTON	283	A			
WILLARD	263	A	0.8	1.3 SE	
MONTANA					
COLUMBIA FALLS	240	A			Canada
CONRAD	229	A			Canada

NAME	*CH*	*CL*	*SITE RESTRICTION (MILES)*	*(Km)*	*CONCURRENCE*
WEST YELLOWSTONE	243	A			
NEBRASKA					
PLATTSMOUTH	293	A	3.7	5.9 E	
WEST POINT	300	A	0.2	0.4 NE	
NEVADA					
HAWTHORNE	228	A			
NEW HAMPSHIRE					
FARMINGTON	293	A	2.3	3.7 SW	Canada
HAMPTON	271	A	2.8	4.5 SW	Canada
LEBANON	263	A			Canada
SOMERSWORTH	254	A	0.2	0.3 SW	Canada
WINCHESTER	254	A			Canada
NEW JERSEY					
ATLANTIC CITY	297	B1	6.3	10.2 NE	
MARGATE CITY	270	A	2.4	3.9 S	
NORTH CAPE MAY	242	A	4.9	7.8 SW	
OCEAN ACRES	253	A			
VILLAS	254	A			
WILDWOOD CREST	222	A	2.3	3.6 SE	
NEW MEXICO					
ALAMOGORDO	279	C1	19.3	31.0 N	Mexico
CARLSBAD	291	C2	2.2	3.5 NE	Mexico
CLOVIS	268	C	4.3	6.9 N	
FARMINGTON	239	C1			
GALLUP	291	C2			
GRANTS	250	C2	3.0	4.7 S	
LAS VEGAS	251	C	11.4	18.4 E	
LOS LUNAS	292	A			
ROSWELL	284	C2	7.4	11.9 NW	Mexico
SANTA FE	234	C	23.3	37.5 NE	
SILVER CITY	233	A			Mexico
TAOS	260	A			
WHITE ROCK	266	A			
NEW YORK					
ARLINGTON	245	A			Canada
AVON	227	A	3.8	6.1 E	Canada
CATSKILL	253	A	4.5	7.2 S	Canada
CENTER MORICHES	241	A	2.6	4.2 E	
CLYDE	229	A			Canada
DANSVILLE	230	A	1.0	1.5 E	Canada
DELHI	262	A			Canada
FORT PLAIN	266	A	0.3	0.5 W	Canada
FREDONIA	243	A	4.5	7.2 SW	Canada

NAME	*CH*	*CL*	*SITE RESTRICTION (MILES)*	*(Km)*	*CONCURRENCE*
NEW YORK (cont'd)					
HIGHLAND	297	A	2.4	3.8 N	Canada
HOMER	268	A			Canada
HOOSICK FALLS	248	A	5.0	8.0 SE	Canada
IRONDEQUOIT	294	A	3.3	5.3 NW	Canada
MECHANICVILLE	283	A	4.0	6.5 W	Canada
NEW PALTZ	227	A	1.4	2.3 SW	Canada
PALMYRA	259	A			Canada
PHOENIX	271	A	0.8	1.2 SE	Canada
PLATTSBURGH	278	A	0.6	1.0 W	Canada
POUGHKEEPSIE	241	A			Canada
RAVENA	233	A			Canada
ROCHESTER	290	A	4.4	7.1 E	Canada
SODUS	278	A	3.0	4.9 N	Canada
STILLWATER	267	A			Canada
SYRACUSE	290	A	1.6	2.6 N	Canada
UTICA	264	A			Canada
WARRENSBURG	263	A			Canada
WATERLOO	253	A	3.2	5.1 SE	Canada
WEBSTER	274	A	0.6	0.9 W	Canada
WHITEHALL	231	A			Canada
NORTH CAROLINA					
BAYBORO	250	A			
ELIZABETHTOWN	289	A			
FAIRBLUFF	287	A	4.1	6.5 NW	
GASTON	250	A	2.3	3.7 E	
LOUISBURG	273	A			
MURPHY	282	A			
NEW BERN	231	A			
OLD FORTH	282	A			
PATTERSON	264	A	2.0	3.2 N	
RALEIGH	275	A	2.5	4.1 N	
ROCKY MOUNT	253	A	3.2	5.2 E	
ROSE HILL	284	A			
ST PAULS	295	A	5.0	8.0 S	
WARRENTON	297	A	4.6	7.4 E	
WILMINGTON	287	A			
WINDSOR	255	A			
WRIGHTSVILLE BEACH	229	A	0.5	0.8 NE	
NORTH DAKOTA					
BEULAH	250	A			Canada
LANGDON	239	A			Canada
OHIO					
ADA	235	A	0.9	1.5 NW	Canada
BARNESVILLE	228	A			Canada
BYESVILLE	249	A			Canada

NAME	CH	CL	SITE RESTRICTION (MILES)	(Km)	CONCURRENCE
OHIO (cont'd)					
COAL GROVE	246	A			
CRESTLINE	254	A	0.3	0.5 SW	Canada
CROOKSVILLE	297	A			Canada
DELAWARE	300	A			Canada
DELTA	293	A	4.5	7.3 E	Canada
EDGEWOOD	273	A	1.5	2.4 W	Canada
FORT SHAWNEE	298	A	1.9	3.1 SE	Canada
GIBSONBURG	239	A	2.0	3.2 N	Canada
GREENFIELD	248	A			Canada
GROVE CITY	266	A	4.2	6.7 S	Canada
HURON	241	A			Canada
LEBANON	247	A			Canada
LIMA	226	A			Canada
LOUDONVILLE	299	A			Canada
MARYSVILLE	289	A			Canada
MONTPELIER	283	A	3.5	5.6 W	Canada
N BALTIMORE	299	A			Canada
NELSONVILLE	299	A			Canada
OAK HARBOR	247	A			Canada
PAULDING	259	A			Canada
RIPLEY	258	A			
SHADYSIDE	239	A			Canada
ST MARYS	277	A			Canada
SWANTON	297	A	0.7	1.1 W	Canada
TROY	245	A	2.9	4.6 SW	Canada
UHRICHSVILLE	260	A	3.9	6.2 NW	Canada
UNION CITY	248	A	0.1	0.2 S	Canada
UPPER ARLINGTON	255	A	2.7	4.4 SE	Canada
WAUSEON	245	A			Canada
WILLARD	245	A	4.7	7.5 E	Canada
OKLAHOMA					
ANTLERS	281	A	2.2	3.6 N	
BIXBY	287	A			
COMMERCE	259	A			
CORDELL	229	A			
ELDORADO	232	A	1.0	1.6 N	
HEAVENER	223	A			
HOLDENVILLE	293	A	0.5	0.9 SW	
HOLLIS	223	A			
LAWTON	297	C2	6.8	11.0 SE	
LINDSAY	286	A			
TISHOMINGO	292	A			
WAGONER	271	A			
WILBURTON	279	A			
OREGON					
ALTAMONT	267	C	17.0	27.5 E	

NAME	*CH*	*CL*	*SITE RESTRICTION (MILES)*	*(Km)*	*CONCURRENCE*
OREGON (cont'd)					
MILTON-FREEWATER	250	A			
MYRTLE POINT	231	A			
NYSSA	254	A			
OAKRIDGE	221	A	1.2	2.0 SE	
REEDSPORT	221	A			
SEASIDE	234	A			Canada
SUTHLERLIN	266	A			
PENNSYLVANIA					
BARNESBORO	223	A	2.8	4.5 NW	Canada
BERWICK	278	A	2.2	3.5 NW	Canada
CURWENSVILLE	275	A	3.6	5.7 N	Canada
EDINBORO	250	A	4.8	7.7 NW	Canada
ELIZABETHVILLE	263	A	1.4	2.2 N	Canada
ERIE	234	A			Canada
EVERETT	298	A	2.8	4.5 W	Canada
JOHNSONBURG	277	A	3.0	4.9 SE	Canada
LEWISBURG	242	A			Canada
MASONTOWN	295	A	4.6	7.4 SW	Canada
MC CONNELLSBURG	279	A			
MEXICO	223	A			Canada
MEYERSDALE	227	A			Canada
MILLERSBURG	255	A	3.7	6.0 W	Canada
MOUNT UNION	258	A			Canada
MT CARMEL	259	A	2.0	3.3 W	Canada
NORTHUMBERLAND	297	A	0.2	0.4 NE	Canada
OLIVER	235	A	1.8	2.9 S	Canada
OLYPHANT	239	A	2.9	4.6 NE	Canada
PATTON	234	A	3.4	5.5 NW	Canada
PHILIPSBURG	290	A	4.5	7.2 E	Canada
PORT ALLEGANY	235	A			Canada
PORTAGE	289	A			Canada
RENOVO	226	A			Canada
REYNOLDSVILLE	258	A			Canada
RIDGEBURY	245	A	3.5	5.6 SW	Canada
SCRANTON	258	A	2.1	3.4 NW	Canada
SPANGLER	247	A			Canada
SUSQUEHANNA	223	A			Canada
TOBYHANNA	300	A			Canada
TUNKHANNOCK	299	A	4.0	6.5 NW	Canada
RHODE ISLAND					
NARRAGANSETT PIER	274	A	3.4	5.5 S	
WAKEFIELD-PEACEDALE	259	A	3.4	5.5 SW	

NAME	CH CL	SITE RESTRICTION (MILES)	(Km)	CONCURRENCE
SOUTH CAROLINA				
BISHOPVILLE	229 A			
CHARLESTON	264 A	3.3	5.3 NE	
CONWAY	230 A			
ELLOREE	262 A			
GEORGETOWN	229 A	5.3	8.5 S	
GREER	277 A			
HARDEEVILLE	266 A	2.7	4.4 S	
JOHNSONVILLE	286 A			
KERSHAW	291 A	2.8	4.6 N	
KINGSTREE	231 A			
LORIS	290 A			
MARION	263 A			
MURRELL'S INLET	233 A	1.0	1.6 NE	
NEW ELLENTON	274 A	3.8	6.1 NE	
ORANGEBURG	275 A	0.9	1.4 S	
PAMPLICO	271 A			
PAWLEY'S ISLAND	262 A			
ST MATTHEWS	230 A	0.7	1.1 SE	
ST STEPHEN	290 A	2.8	4.5 N	
SUMTER	234 A			
WALTERBORO	287 A	2.0	3.2 W	
WILLISTON	234 A			
SOUTH DAKOTA				
CANTON	273 A			
MISSION	264 A			
PINE RIDGE	243 A			
REDFIELD	249 A			
TENNESSEE				
CALHOUN	281 A	2.5	4.0 NW	
CELINA	268 A			
CRAB ORCHARD	239 A	0.1	0.1 SE	
HARROGATE	243 A	2.6	4.2 NE	
JACKSON	268 A			
KNOXVILLE	283 A	1.1	1.7 E	
LOUDON	287 A			
PARSONS	247 A	3.0	4.8 E	
RIPLEY	231 A	4.3	7.0 NE	
ROCKWOOD	289 A	1.8	2.9 E	
ROGERSVILLE	293 A	3.6	5.8 NW	
SELMER	230 A			
SPENCER	254 A			
SPRING CITY	230 A	1.3	1.7 E	
SURGOINSVILLE	282 A	3.0	4.8 SW	

NAME	*CH*	*CL*	*SITE RESTRICTION (MILES)*	*(Km)*	*CONCURRENCE*
TENNESSEE (cont'd)					
TAZEWELL	231	A			
TEXAS					
ABILENE	223	C2	1.7	2.7 S	
BEAUMONT	273	C2	6.9	11.1 S	
BEEVILLE	250	A			Mexico
BLOOMINGTON	295	A	2.5	4.1 S	Mexico
BOWIE	264	A			
BRYAN	258	A	2.1	3.4 SE	
CAMERON	267	A	3.6	5.8 NE	
CAMPWOOD	256	A			Mexico
CARRIZO SPRINGS	221	A			Mexico
CLARKSVILLE	253	A			
CORPUS CHRISTI	234	A	4.9	7.9 W	Mexico
DAINGERFIELD	295	A			
EDNA	269	A			
ELECTRA	236	A			
ELGIN	223	A	1.4	2.2 SE	
FRIONA	236	A			
JACKSBORO	229	A			
JEFFERSON	283	A	3.4	5.5 N	
KILLEEN	222	A			
LAREDO	291	A	3.1	5.1 E	Mexico
LONGVIEW	247	C2			
MADISONVILLE	241	C2	10.2	16.4 W	
MIDLAND	236	A	0.5	0.9 SW	Mexico
MUENSTER	293	A	1.1	1.8 N	
NAVASOTA	223	A			
NEW BOSTON	278	A			
NOLANVILLE	297	A			
ODESSA	241	C2	13.8	22.2 SW	Mexico
PALACIOS	264	A			Mexico
PEARSALL	231	A			Mexico
PECOS	247	C	14.6	23.4 S	Mexico
PITTSBURG	245	A	2.0	3.2 NE	
PLAINVIEW	295	C2	1.8	2.8 S	
PORT ISABEL	266	A			Mexico
POST	297	A			
RAYMONDVILLE	289	A	1.5	2.4 NE	Mexico
ROBSTOWN	286	A	0.4	0.5 W	Mexico
ROCKDALE	253	A	1.2	2.0 W	
SAN ANGELO	270	C1			Mexico
SAN AUGUSTINE	260	A			
SAN DIEGO	290	A			Mexico
STANTON	290	A			Mexico
TAHOKA	237	A	4.2	6.7 SW	
TYLER	281	C2	7.5	12.1 W	
UVALDE	229	A	3.4	5.5 NE	Mexico

NAME	*CH CL*	*SITE RESTRICTION (MILES)*	*(Km)*	*CONCURRENCE*
TEXAS (cont'd)				
VICTORIA	222 A			
WICHITA FALLS	288 A			
UTAH				
NEPHI	224 A			
PAYSON	222 A			
ROOSEVELT	230 A			
TORREY	253 A			
VIRGINIA				
ALBERTA	299 A			
BEDFORD	295 A	2.1	3.3 W	
BRIDGEWATER	286 A			Quiet Zone
BROADWAY	238 A			Quiet Zone
CHARLOTTESVILLE	298 A	1.7	2.7 SW	Quiet Zone
CHASE CITY	260 A			
CHESAPEAKE-PORTSMITH-VIRGINIA BEACH	271 A			
CHRISTIANSBURG	264 A			
CHURCHVILLE	294 A			Quiet Zone
CLINCHCO	259 A			
COEBURN	297 A	3.2	5.1 S	
EMPORIA	258 A	1.9	3.0 SW	
EXMORE	291 A			
GLOUCESTER	256 A	0.7	1.1 N	
LAWRENCEVILLE	255 A			
LYNCHBURG	290 A			
MOUNT JACKSON	245 A			Quiet Zone
NARROWS	267 A			
PETERSBURG	262 A	4.0	6.4 S	
RICHMOND	266 A			
ROANOKE	287 A	2.8	4.5 W	
RUCKERSVILLE	221 A			
SALTVILLE	291 A	3.0	4.8 SW	
SOUTH BOSTON	294 A	1.6	2.6 NE	
VINTON	268 A	4.8	7.7 N	
WEST POINT	300 A			
WASHINGTON				
CAMAS	234 A	4.8	7.8 W	Canada
DAYTON	223 A			Canada
MEDICAL LAKE	237 A			Canada
NACHES	245 A			Canada
YAKIMA	289 C1	5.9	9.5 NW	Canada
WEST VIRGINIA				
BRIDGEPORT	281 A			
DANVILLE	223 A			

NAME	*CH CL*	*SITE RESTRICTION (MILES)*	*(Km)*	*CONCURRENCE*
WEST VIRGINIA (cont'd)				
FISHER	279 A			Quiet Zone
MANNINGTON	274 A			Canada
MATEWAN	294 A			
MOUNDSVILLE	243 A	3.6	5.7 SE	
MT GAY-SHAMROCK	234 A			Canada
POINT PLEASANT	258 A			Canada
SALEM	289 A			
WHITE SULPHUR SPRING	227 A	3.7	6.0 NE	Quiet Zone
WISCONSIN				
ALGOMA	243 A			Canada
BLACK RIVER FALLS	259 A			
BLOOMER	236 A			
BRILLION	242 A			
COLUMBUS	263 A	3.6	5.7 NW	
EVANSVILLE	290 A	3.9	6.3 SE	
MAYVILLE	259 A	2.1	3.4 NE	
NEKOOSA	229 A			
PLYMOUTH	283 A			
RUDOLPH	260 A			
SEYMOUR	282 A			
WAUTOMA	222 A			
WHITEWATER	283 A	2.4	3.9 E	
WYOMING				
KEMMERER	297 A			
PUERTO RICO				
RIO GRANDE	247 B1	9.3	14.9 NE	

APPENDIX B

Channel No.	*City*
ALABAMA	
Bay Minette	288A, 293A
Brundidge	234A
Cordova	225A
Dothan	238, 259, 273A
Elba	266A
Eutaw	282A
Florence	241A, 297
Fort Rucker	226A
Homewood	247A
Linden	275A
Montgomery	222, 241A, 255, 270, 277
Orange Beach	289A
Oxford	250A
Selma	261A, 265A, 287C2
Talladega	224A, 248A
Vernon	293A
Winfield	290A
ALASKA	
Anchorage	225, 247, 251, 255, 263, 267, 271 *276A, 281, 287 293, 298
Bethel	261A, 300A
ARIZONA	
Buckeye	295A
Chinle	297A
Flagstaff	225, 230, 248, 275C2
Globe	247A, 262,
Kearny	286A
Oraibi	252A
Paradise Valley	290A
San Carlos	279A
Sierra Vista	265A, 269A
Tuba City	250A
Window Rock	276A
Yuma	226, 236, 250A, 265A

Channel No.	*City*
ARKANSAS	
Beebe	268A
Bella Vista	293A
Cabot	273A
Clarendon	297A
Dermott	289A
El Dorado	227A, 240A, 257A, 276A
England	243A
Eudora	268A
Glenwood	283A
Hamburg	258A
Hardy	284A
Helena	233A, 276A,
Horseshoe Bend	293A
Little Rock	231, 239, 253, 258A, 279
Malvern	268A
Marianna	295A
Marked Tree	229A
North Crossett	274A
Pine Bluff	222, 235, 257A, 267A
Texarkana	284A, 296A
Trumann	294A

Channel No.	*City*
CALIFORNIA	
Atwater	223A
Avenal	289A
Bakersfield	221A, 231, 243, 257A 268, 296A, 300
Cartago	275A
China Lake	274A
Chowchilla	227A
Colusa	243A
Crescent North	250A
East Hemet	277A
East Porterville	263A
Earlimart	265A
Firebaugh	276A
Ford City	271A
George	264A
Gonzales	282A
Gridley	268A
Hanford	233A, 279, 298
Idyllwild	267A
Independence	292A
Kingsburg	292A
Lake Isabella	283A
Lenwood	285A
Lindsay	277A
Lucerne Valley	293A
Madera	221A, 297A
McFarland	275A
Mendota	272A
Merced	248, 268, 292A, 299A
Modesto	230A, 272A, 277, 281
Montecito	225A
Orange Cove	262A
Orland	293A
Oxnard	252A, 271A, 284
Rio Dell	296A
Rohnerville	263A
Sacramento	233, 241, 245, 253, 263, 278A 286, 293, 300
Salinas	250A, 264, 273, 280A
San Jacinto	241A
San Luis Obispo	227, 241, 246B1, 251
Santa Barbara	229, 248, 260, 277, 299B1
Searles Valley	283A
Sebastopol	229A
Shafter	282A
Soledad	287A
South Oroville	285A
Visalia	225, 241A, 246
Winton	254A

Channel No.	*City*
COLORADO	
Brush	292A, 296A
La Junta	221A, 295A
Las Animas	297A
Pueblo	245, 255, 260, 264, 283C1, 296A, 300
CONNECTICUT	
East Lyme	254A
Enfield	250A
Ledyard	293A
Litchfield	247A
Pawcatuck	299A
Salisbury	251A
Sharon	277A
DELAWARE	
Lewes	290A
Milford	249A, 267A
Selbyville	250A
Smyrna	225A
FLORIDA	
Alachua	223A
Century Village	286A
Chattahoochee	287A
Chiefland	247A
Edgewater	226A
Englewood	290A
Gifford	234A
Graceville	271A
Gretna	264A
Holly Hill	277A
Key Colony Beach	288A
Key West	223, 228A, 254, 258, 296A, 300C1
Marianna	227A, 286A
Monticello	270A
Orlando	222, 243, 255A, 262, 286
Pensacola	231, 264, 268, 291A, 297
Quincy	269A, 274A, 285A,
Summerland Key	275A
Tallahassee	235, 240A, 255, 276A, 281, 291A
Tice	229A
Watertown	289A

Channel No.	*City*
GEORGIA	
Arco	290A
Ashburn	289A
Cuthbert	264A
Ft. Oglethorpe	239
Ft. Valley	250A, 292A
Hogansville	248A
Irwinton	279A
Jeffersonville	248A
Lakeland	290A
Leesburg	279A
Lyons	223A
Mableton	273A
Macon	222A, 256, 287, 300
Milledgeville	264A, 272A
Millen	235A
Montezuma	223A
Omega	298A
Reidsville	281A
Royston	279A
Sparta	249A, 274A
Statesboro	261A, 275A
Sylvester	271A
Valdosta	225, 240A, 244A, 266, 299A
HAWAII	
Honolulu	226, 230, 234, 238, 248, 253, 258, 262, 286, 290
IDAHO	
American Falls	281A
Gooding	267A
Hayden	233A

Channel No.	*City*
ILLINOIS	
Bushnell	284A
Carrier Mills	283A
Carterville	236A
Casey	286A
Champaign	233, 248, 262B1
Coal City	264A
Decatur	226A, 236, 257A, 275
Dwight	255A
Eureka	253A
Farmington	239A
Galena	298A
Galva	273A
Henry	263A
Kankakee	224A, 236A, 260
Mahomet	290A
Marseilles	243A
Marshall	290A
Morrison	236A
Nashville	284A
Newton	295A
Oregon	291A
Peoria	222A, 227, 289, 295
Pinckneyville	282A
Polo	299A
Spring Valley	277A
Woodlawn	295A

Channel No.	*City*	
INDIANA		
Anderson	250, 254A	
Attica	239A	
Austin	242A	
Berne	230A	
Bicknell	289A	
Bloomfield	266A	
Charlestown	282A	
Clinton	230A	
Corydon	243A	
Delphi	275A	
Evansville	281, 287, 298A	
Fort Branch	268A	
Fort Wayne	222A, 236, 247, 269A, 280A	
Mitchell	273A	
Mount Vernon	294A	
Nappanee	239A	
New Haven	300A	
Newburgh	291A	
Noblesville	230A	
Royal Center	241A	Canada
South Bend	225, 268, 276A, 280A, 292A	
IOWA		
Belle Plaine	239A	
Cresco	272A	
Des Moines	227, 235, 247, 262, 273, 298C2	
Eldora	258A	
Grinnell	294A	
Jefferson	255A	
Manchester	234A	
New Hampton	236A	
Rock Valley	295A	
Sac City	286A	
Sibley	262A	
Winterset	239A	

Channel No.	*City*
KANSAS	
Augusta	242A
Fredonia	281A
Girard	266A
Herington	242A
Kingman	232A, 257A
Medicine Lodge	240A
North Fort Filey	273C2
Olathe	222A
Plainville	244A
Topeka	223A, 247, 262, 295, 299
KENTUCKY	
Beaver Dam	274A
Berea	294A
Buffalo	268A
Burkesville	253A
Cave City	294A
Cumberland	274A
Edmonton	256A
Eminence	289A
Harlan	286A
Hawesville	289A
Irvine	291A
Lancaster	286A
Lawrenceburg	271A
Lexington-Fayette	225, 233, 251, 283C2
Louisa	222A
Louisville	248, 259, 263C2 272A, 276A 280A, 295
Marion	274A
Midway	300A
Nicholasville	264A
Radcliff	278A
Salyersville	247A
Shelbyville	267A
Shepherdsville	286A
Springfield	274A
Vancleve	260A
Whitley City	290A
Williamsburg	282A
Wilmore	242A

Channel No.	*City*
LOUISIANA	
Alexandria	226, 245, 262, 289A
Arcadia	223A
Basile	271A
Bastrop	232A, 261A, 277A
Berwick	290A
Breaux Bridge	243A
Bunkie	282A
Buras Triumph	231A
Coushatta	222A
Erath	225A
Homer	260A
Jonesville	266A
Lafayette	233, 238A, 260
Lake Arthur	297A
Lake Charles	241, 258, 279, 287C2
Larose	262A
Monroe	270, 281, 287C2, 291
New Iberia	229C2, 256
North Fort Polk	294A
Opelousas	290A, 296A
Rayne	294A
Reserve	235A
Ruston	258A, 298
Shreveport	229, 233, 243 261A, 266, 279A
South Fort Polk	267A
Vivian	239A
Washington	284A
MAINE	
Dexter	271A
Fairfield	227A
Madison	248A
Mexico	264A
Pittsfield	258A
Topsham	238A
Van Buren	251A
Winslow	237A
MARYLAND	
Crisfield	245A
Pocomoke City	273, 293A
Salisbury	232A, 255A, 288A,
Westernport	224A

Channel No.	*City*
MASSACHUSETTS	
Athol	260A
Great Barrington	286A
Orange	247A
South Yarmouth	280A
Turners Falls	230A
MICHIGAN	
Allegan	222A
Benton Harbor	235A, 260
Buchanan	256A
Carrollton	263A
Essexville	247A
Grand Rapids	229, 239, 245, 250, 255A, 267, 275, 281, 289
Hartford	279A
Kingsford	255A
Muskegon	283, 295, 300A
Oscoda	239C2, 261A
Portage	243A
Saginaw	251, 283A, 292A, 296A
Spring Arbor	295A
Standish	245A
Vassar	255A
Walker	263A
Wurtsmith	235A
MINNESOTA	
Babbitt	294A
Caledonia	234A
Eden Prairie	289A
Granite Falls	230A
Jackson	287A
La Crescent	274A
Lakeville	286A
Le Sueur	241A
Mora	237A
New Prague	238A
Sleepy Eye	297A
Springfield	289A
Staples	234A
Stewartville	235A
Tracy	286A
Two Harbors	282A

Channel No.	*City*
MISSISSIPPI	
Bay St. Louis	233A
Belzoni	225A, 296A
Clarksdale	243A, 269A, 292A
Cleveland	224A, 280A, 299A
Columbus	235C2, 276A, 280A
Greenville	250, 264, 284C2
Greenwood	256, 270A
Holly Springs	224A, 235A
Indianola	245A, 288A
Laurel	251A, 262, 272A
Lexington	273A, 292A
Lucedale	295A
Meridian	246, 267, 271A
Monticello	271A
Mound Bayou	271A
Natchez	236, 247A
State College	282A
Vicksburg	254, 266A, 294
Water Valley	268A
Wiggins	250A
Yazoo City	221A, 229A
MISSOURI	
Ava	290A
Bonne Terre	282A
Cassville	227A
Chaffee	284A
Charleston	291A
Cuba	271A
Kirksville	228A, 233, 300C1
Lamar	260A
Mt. Vernon	294A
Perryville	294A
Republic	258A
Richmond	223A
Southwest City	262A
Sparta	243A
St. James	258A
Warrenton	260A
Washington	283A
Willard	263A
MONTANA	
Columbia Falls	240A
Conrad	229A
West Yellowstone	243A
NEBRASKA	
Plattsmouth	293A
West Point	300A

Channel No.	*City*
NEVADA	
Hawthorne	228A
NEW HAMPSHIRE	
Farmington	293A
Hampton	271A
Lebanon	263A
Somersworth	254A
Winchester	254A
NEW JERSEY	
Atlantic City	236, 240A, 245, 279, 297B1
Margate City	270A
North Cape May	242A
Ocean Acres	253A
Villas	254A
Wildwood Crest	222A
NEW MEXICO	
Alamogordo	232A, 279C1, 288A
Carlsbad	221A, 281, 291C2
Clovis	256, 260, 268, 298
Farmington	225, 239C1, 245, 271
Gallup	229, 233, 256, 291C2
Grants	237A, 250C2
Las Vegas	251, 265A,
Los Lunas	272A, 292A
Roswell	235, 246, 263, 284C2
Santa Fe	234, 238, 247, 281, 286, 290
Silver City	224A, 233A
Taos	260A, 269A
White Rock	266A

Channel No.	*City*
NEW YORK	
Arlington	245A
Avon	227A
Catskill	253A
Center Moriches	241A
Clyde	229A
Dansville	230A
Delhi	262A
Fort Plain	266A
Fredonia	243A
Highland	297A
Homer	268A
Hoosick Falls	248A
Irondequoit	294A
Mechanicville	283A
New Paltz	227A
Palmyra	259A
Phoenix	271A
Plattsburgh	260, 278A
Poughkeepsie	221A, 241A, 268, 284
Ravena	233A
Rochester	223, 243, 250, 255, 263, 267, 280A, 290A
Sodus	278A
Stillwater	267A
Syracuse	226, 233, 265A, 275, 290A, 300
Utica	245, 254, 264A, 282, 297
Warrensburg	263A
Waterloo	253A
Webster	274A
Whitehall	231A

Channel No.	*City*
NORTH CAROLINA	
Bayboro	250A
Elizabethtown	289A
Fairbluff	287A
Gaston	250A
Louisburg	273A
Murphy	282A
New Bern	231A, 270, 293
Old Fort	282A
Paterson	264A
Raleigh	234, 241, 268, 275A
Rocky Mount	221A, 253A, 264
Rose Hill	284A
St. Pauls	295A
Warrenton	297A
Wilmington	247, 260, 265A 274, 287A
Windsor	249A, 255A
Wrightsville Beach	229A
NORTH DAKOTA	
Beulah	250A
Langdon	239A

Channel No.	*City*
OHIO	
Ada	235A
Barnesville	228A
Byesville	249A
Coal Grove	246A
Crestline	254A
Crooksville	297A
Delaware	300A
Delta	293A
Edgewood	273A
Fort Shawnee	298A
Gibsonburg	239A
Greenfield	248A
Grove City	266A
Huron	241A
Lebanon	247A
Lima	226A, 249A, 271, 285A
Loudonville	299A
Marysville	289A
Montpelier	283A
N Baltimore	299A
Nelsonville	299A
Oak Harbor	247A
Paulding	259A
Ripley	258A
Shadyside	239A
St. Marys	277A
Swanton	297A
Troy	245A
Uhrichsville	260A
Union City	248A
Upper Arlington	255A
Wauseon	245A
Willard	245A
OKLAHOMA	
Antlers	281A
Bixby	287A
Commerce	259A
Cordell	229A, 257A
El Dorado	232A
Heavener	223A
Holdenville	293A
Hollis	223A
Lawton	237A, 251, 268, 297C2
Lindsay	286A
Tishomingo	292A
Wagoner	271A
Wilburton	279A

Channel No.	*City*
OREGON	
Altamont	267
Milton-Freewater	250A
Myrtle Point	231A
Nyssa	254A
Oakridge	221A
Reedsport	221A
Seaside	234A
Sutherlin	266A
PENNSYLVANIA	
Barnesboro	223A
Berwick	278A
Curwensville	275A
Edinboro	250A
Elizabethville	263A
Erie	234A, 260, 272A 279, 292A
Everett	298A
Johnsonburg	277A
Lewisburg	242A
Masontown	295A
McConnellsburg	279A
Mexico	223A
Meyersdale	227A
Millersburg	255A
Mount Carmel	259A
Mount Union	258A
Northumberland	297A
Oliver	235A
Olyphant	239A
Patton	234A
Philipsburg	290A
Port Allegany	235A
Portage	289A
Renovo	226A
Reynoldsville	258A
Ridgebury	245A
Scranton	258A, 267, 285A, 296A
Spangler	247A
Susquehanna	223A
Tobyhanna	300A
Tunkhannock	299A
RHODE ISLAND	
Narragansett Pier	274A
Wakefield-Peacedale	259A

Channel No.	*City*
SOUTH CAROLINE	
Bishopville	229A
Charleston	236, 245, 264A, 278
Conway	230A, 281
Elloree	262A
Georgetown	229A, 249A, 292A
Greer	277A
Hardeeville	266A
Johnsonville	286A
Kershaw	291A
Kingstree	231A, 252A
Loris	290A
Marion	232A, 263A
Murrell's Inlet	233A
New Ellenton	274A
Orangeburg	275A, 280A, 294
Pamplico	271A
Pawley's Island	262A
St. Matthews	230A
St. Stephen	290A
Sumter	234A, 267
Walterboro	265A, 287A
Williston	234A
SOUTH DAKOTA	
Canton	273A
Mission	264A
Pine Ridge	243A
Redfield	249A, 279
TENNESSEE	
Calhoun	281A
Celina	268A
Orchard	239A
Harrogate	243A
Jackson	268A, 276A, 281
Knoxville	248, 278, 283A, 299
Loudon	287A
Parsons	247A
Ripley	231A, 237A
Rockwood	289A
Rogersville	293A
Selmer	230A, 288A
Spencer	254A
Spring City	230A
Surgoinsville	282A
Tazewell	231A

Channel No.	*City*
TEXAS	
Abilene	223C2, 264, 286, 292A, 300
Beaumont	231, 236, 248, 273C2, 300
Beeville	250A, 285A
Bloomington	295A
Bowie	264A
Bryan	252A, 258A, 285A
Cameron	267A, 276A,
Campwood	256A
Carrizo Springs	221A, 228A
Clarksville	253A
Corpus Christi	230, 234A, 238, 243, 256, 260
Daingerfield	295A
Edna	269A
Electra	236A
Elgin	223A
Friona	236A
Jacksboro	229A
Jefferson	283A
Killeen	222A, 227, 288A
Laredo	224A, 235, 251, 291A
Longview	247C2, 289,
Madisonville	241C2
Midland	222, 227, 236A, 277, 294
Muenster	293A
Navasota	223A
New Boston	240A, 278A
Nolanville	297A
Odessa	241C2, 245, 250, 256
Palacios	264A
Pearsall	231A, 237A
Pecos	247, 252A
Pittsburg	245A, 276A
Plainview	247, 280A, 295C2
Port Isabel	266A
Post	297A
Raymondville	269A, 289A
Robstown	260, 286A
Rockdale	253A
San Angelo	225, 230, 234, 248, 254, 270C1, 298
San Augustine	260A
San Diego	290A
Stanton	290A
Tahoka	237A
Tyler	221A, 226, 268, 281C2
Uvalde	229A, 272A, 285A
Victoria	222A, 236, 254, 265A, 300

Channel No.	*City*
Wichita Falls	225, 260, 277, 288A, 292A
UTAH	
Nephi	224A
Payson	222A
Roosevelt	230A
Torrey	253A
VIRGINIA	
Alberta	299A
Bedford	295A
Bridgewater	286A
Broadway	238A
Charlottesville	224A, 237A, 248, 298A
Chase City	260A
Chesapeake-Portsmouth-Virginia Beach	235, 271A
Christiansburg	264A
Churchville	294A
Clinchco	259A
Coeburn	297A
Emporia	258A
Exmore	291A, 298
Gloucester	256A
Lawrenceville	255A, 288A
Lynchburg	252A, 261A, 269A, 290A
Mount Jackson	245A
Narrows	267A
Petersburg	237A, 257A, 262A
Richmond	233, 251, 271, 266A, 279, 293
Roanoke	222, 235, 256, 287A
Ruckersville	221A
Saltville	291A
South Boston	248, 294A
Vinton	268A
West Point	300A
WASHINGTON	
Camas	234A
Dayton	223A
Medical Lake	237A
Naches	245A
Yakima	233, 252A, 257A, 281, 289C1, 297

Channel No.	*City*
WEST VIRGINIA	
Bridgeport	281A
Danville	223A
Fisher	279A
Mannington	274A
Matewan	294A
Moundsville	243A, 288A
Mt. Gay-Shamrock	234A
Point Pleasant	258A
Salem	289A
White Sulphur Springs	227A
WISCONSIN	
Algoma	243A
Black River Falls	259A
Bloomer	236A
Brillion	242A
Columbus	263A
Evansville	290A
Mayville	259A
Nekoosa	229A
Plymouth	283A
Rudolph	260A
Seymour	282A
Wautoma	222A
Whitewater	283A
WYOMING	
Kemmerer	297A
PUERTO RICO	
Rio Grande	247B1

APPENDIX C

IN THE FOLLOWING LIST, CITIES IN THE LEFT COLUMN WERE DENIED A CHANNEL. IN THE RIGHT COLUMN WE HAVE INDICATED THE CITY OR CITIES THAT WERE CHOSEN BY THE COMPARATIVE WEIGHTING PROCESS.

CITY	*STATE*	*CITY*	*STATE*	*CHN/CL*
ALABASTER	AL —	HOMEWOOD	AL	247 A
ANNISTON	AL —	OXFORD	AL	250 A
FOLEY	AL —	BAY MINETTE	AL	293 A
GULF SHORES	AL —	(1) BAY MINETTE	AL	293 A
		(2) PENSACOLA	FL	291 A
		(3) ORANGE BEACH	AL	289 A
LINEVILLE	AL —	HOGANSVILLE	GA	248 A
MOBILE	AL —	ORANGE BEACH	AL	289 A
ROCKFORD	AL —	(1) TALLADEGA	AL	248 A
		(2) HOMEWOOD	AL	247 A
VESTAVIA HILLS	AL —	HOMEWOOD	AL	247 A
SANTA ROSA	CA —	SEBASTOPOL	CA	229 A
NEW LONDON	CT —	EAST LYME	CT	254 A
PLAINFIELD	CT —	WAKEFIELD/PEAC	RI	259 A
STAFFORD SPRINGS	CT	WAKEFIELD/PEAC	RI	259 A
DAYTONA BEACH	FL —	HOLLY HILL	FL	277 A
FT MYERS	FL —	TICE	FL	229 A
ALBANY	GA —	LEESBURG	GA	279 A
BAINBRIDGE	GA —	TALLAHASSEE	FL	291 A
BARNESVILLE	GA —	MABLETON	GA	273 A
COLLEGE PARK	GA —	MABLETON	GA	273 A
DOUGLASVILLE	GA —	MABLETON	GA	273 A
EATONTON	GA —	MILLEDGEVILLE	GA	264 A
FAYETTEVILLE	GA —	MABLETON	GA	273 A
LAFAYETTE	GA —	FT OGLETHORPE	GA	239 A
MARIETTA	GA —	MABLETON	GA	273 A
PEACHTREE CITY	GA —	MABLETON	GA	273 A
RINGGOLD	GA —	FT OGLETHORPE	GA	239 A
TRION	GA —	FT OGLETHORPE	GA	239 A
ANAMOSA	IA —	MANCHESTER	IA	234 A
HARVARD	IL —	WHITEWATER	WI	283 A
McLEANSBORO	IL —	CARRIER MILLS	IL	283 A
KANSAS CITY	KS —	(1) OLATHE	KS	222 A
		(2) RICHMOND	MO	223 A
INEZ	KY —	MATEWAN	WV	294 A
MORGANTOWN	KY —	BEAVER DAM	KY	274 A
LOCKPORT	LA —	LAROSE	LA	262 A
BREWSTER	MA —	S YARMOUTH	MA	280 A
HOLYOKE	MA —	ENFIELD	CT	250 A
NEWBURYPORT	MA —	HAMPTON	NH	271 A
SPRINGFIELD	MA —	ENFIELD	CT	250 A
YARMOUTH	ME —	TOPSHAM	ME	238 A
KALAMAZOO	MI —	ALLEGAN	MI	222 A
MINNEAPOLIS	MN —	EDEN PRAIRIE	MN	289 A
CAMERON	MO —	RICHMOND	MO	223 A
DE SOTO	MO —	BONNE TERRE	MO	282 A

BANNER ELK	NC —	PATTERSON	NC	264 A
MARSHALL	NC —	OLD FORT	NC	282 A
WEST JEFFERSON	NC —	PATTERSON	NC	264 A
WOODBINE	NJ —	SMYRNA	DE	225 A
LOVELAND	OH —	LEBANON	OH	247 A
MANSFIELD	OH —	GIBSONBURG	OH	239 A
MARBLEHEAD	OH —	HURON	OH	241 A
MT GILEAD	OH —	CRESTLINE	OH	254 A
TROTWOOD	OH —	(1) LEBANON	OH	247 A
		(2) TROY	OH	245 A
		(3) UNION CITY	OH	248 A
LYKENS	PA —	ELIZABETHVILLE	PA	263 A
MOUNT POCONO	PA —	TOBYHANNA	PA	300 A
POCONO SUMMIT	PA —	TOBYHANNA	PA	300 A
REPUBLIC	PA —	OLIVER	PA	235 A
SHENANDOAH	PA	TOBYHANNA	PA	300 A
NAGUABO	PR —	RIO GRANDE	PR	247 B1
CLINTON	SC —	GREER	SC	277 A
WOODRUFF	SC —	GREER	SC	277 A
COLONIAL HEIGHTS	TN —	PATTERSON	NC	264 A
GRAYSVILLE	TN	FT OGLETHORPE	GA	239 A
MOUNTAIN CITY	TN —	PATTERSON	NC	264 A
WARTBURG	TN —	SPENCER	TN	254 A
HONDO	TX —	PEARSALL	TX	231 A
GLOUCESTER POINT	VA —	GLOUCESTER	VA	256 A
DELAVAN	WI —	WHITEWATER	WI	283 A
ELKHORN	WI —	WHITEWATER	WI	283 A
LAKE GENEVA	WI —	WHITEWATER	WI	283 A
OCONOMOWOC	WI —	WHITEWATER	WI	283 A
CHARLESTON	WV —	DANVILLE	WV	223 A

THE FOLLOWING COMMUNITIES WERE DENIED CHANNELS FOR THE REASONS STATED:

PELL CITY	AL	SHORT SPACED TO THE BUFFER ZONE OF STATION WRSA, DECATUR, GA
TALLASSEE	AL	SHORT SPACED TO THE APPLICATION GRANTED TO STATION WJAD, BAINBRIDGE, GA
CASAS ADOBES	AZ	FAILED TO DEMONSTRATE COMMUNITY STATUS
PHOENIX	AZ	CLASS A CHANNEL FAILED TO PROVIDE CITY GRADE COVERAGE
TUCSON	AZ	CLASS A CHANNEL FAILED TO PROVIDE CITY GRADE COVERAGE
COVENTRY	CT	SHORT SPACED TO THE APPLICATION GRANTED TO STATION WEBE, WESTPORT, CT
VERNON	CT	SHORT SPACED TO THE APPLICATION GRANTED TO STATION WEBE, WESTPORT, CT
KISSIMMEE	FL	SHORT SPACED TO THE BUFFER ZONE OF STATION WQRK, ST. PETERSBURG, FL

INDIANAPOLIS	IN	CLASS A CHANNEL FAILED TO PROVIDE CITY GRADE COVERAGE
BLOOMINGTON	MN	SHORT SPACED TO THE APPLICATION GRANTED TO STATION KLSS, MASON CITY, IA
EAST PRAIRIE	MO	SHORT SPACED TO THE APPLICATION GRANTED TO STATION WAKH, McCOMB, MS
LONG BEACH	MS	SHORT SPACED TO THE BUFFER ZONE OF STATION WKSJ-FM, MOBILE, AL
CAMP LEJEUNE	NC	CLASS A CHANNEL FAILED TO PROVIDE CITY GRADE COVERAGE
CARY	NC	SHORT SPACED TO THE BUFFER ZONE OF STATION WHKY-FM, HICKORY, NC
SEMORA	NC	SHORT SPACED TO APPLICATION GRANTED TO STATION WRDX, SALISBURY, NC
OMAHA	NE	CLASS A CHANNEL FAILED TO PROVIDE CITY GRADE COVERAGE
BEACHWOOD	NJ	NO SITES AVAILABLE ON LAND TO PROVIDE CITY GRADE COVERAGE
ALBUQUERQUE	NM	CLASS A CHANNEL FAILED TO PROVIDE CITY GRADE COVERAGE
COLUMBUS	OH	CLASS A CHANNEL FAILED TO PROVIDE CITY GRADE COVERAGE
ARROYO	PR	SHORT SPACED TO THE APPLICATION GRANTED TO STATION WMLD, MANATI, PR
WARWICK	RI	NO SITES AVAILABLE TO PROVIDE CITY GRADE COVERAGE
DEL RIO	TX	SHORT SPACED TO MEXICAN PROPOSAL AT CUIDAD ACUNA, COAH, MEXICO
EAGLE PASS	TX	SHORT SPACED TO MEXICAN ALLOTMENT AT FUENTE, COAH, MEXICO

Frequency Assignments, Table of Assignment FM
Table of Assignments

> Action proposing allotment of FM channels to five communities as counterproposals to previous proposed allotments upon showings that counterproposals are consistent with criteria for new FM allotments.
> —*FM B/c Assignments*
> MM Docket No. 84-231

FCC 84-641

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments.	MM Docket No. 84-231

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: December 19, 1984; Released: January 14, 1985

BY THE COMMISSION:

1. In the *First Report and Order* adopted this same day, the Commission has allotted 689 new FM channels throughout the country. In that item, we noted that 224 counterproposals had been accepted for consideration. We are now accepting five more counterproposals in response to opposition comments styled as petitions for reconsideration. The subject counterproposals involve the following communities:

(1) Corbin, Kentucky
(2) Kinston, North Carolina
(3) South Pittsburg, Tennessee
(4) Vergennes, Vermont
(5) LaCrosse, Wisconsin

2. As mentioned in paragraph 3 of the *First Report and Order*, three counterproposals (Corbin, Kentucky; Vergennes, Vermont; and LaCrosse, Wisconsin) specified the provision of first and second aural service, and conflicted with other cities proposed therein, and thus were properly filed in this proceeding. However, these counterproposals also involved the

substitution of channels to a higher class and the modification of license. The subject of license modification in the rule making context was unsettled during this period as a result of a pending Application for Review to the *Helena, Montana* case, 50 RR 2d 70 (1982), *recons.* 48 Fed. Reg. 59025, published November 30, 1983, and no such requests were being considered. Thereafter the Commission policy was established in *Modification of FM and TV Station Licenses,* MM Docket No. 83-1148, 49 Fed. Reg. 34007, published August 28, 1984, enabling us to now entertain requests to modify a station's license to a higher class.

3. The other two counterproposals (Kinston, North Carolina and South Pittsburg, Tennessee) were previously rejected due to certain technical problems. These problems have been resolved in the petitions for reconsideration permitting the acceptance of these requests at this time.

Corbin, Kentucky

4. Crawford Broadcasting, Inc. ("Crawford"), licensee of Station WCTT (Channel 296A), Corbin, Kentucky, submitted a counterproposal for the allotment of Channel 297C2 to Corbin, and the modification of its license to specify the new channel. This proposal conflicted with the Commission's proposal to allot Channel 294A to Jellico, Tennessee. Crawford indicated the upgrade would permit it to better serve the needs of the community and surrounding area, by providing a first aural service to a population of 21,707 (462 square miles). This study has not been confirmed by staff analysis and we seek comments on the accuracy of this showing.

5. Jellico, Tennessee, and Corbin, Kentucky, are only 35.1 kilometers (22 miles) apart and for third adjacent channels the minimum distance separation requirement is 55 kilometers (34 miles). Therefore, both allotments cannot be made.

6. In accordance with our established policy, we shall propose to modify the license of Station WCTT (Channel 296A) to specify operation on Channel 297C2. However, should another party indicate an interest in the Class C2 allotment, then modification may not be implemented. See, *Cheyenne, Wyoming,* 62 FCC 2d 63 (1976), and *Modification of FM and TV Station Licenses, supra.*

Vergennes, Vermont

7. Radio Vergennes, Inc., licensee of Station WIZN, Vergennes, Vermont, filed a counterproposal for the allotment of Channel 294C2 and modification of its license to specify operation on the new channel. In order to accomplish this, Channel 294A could not be allotted to Plattsburgh or to Granville, New York, as proposed in the *Notice of Proposed Rule Making.* Granville has since been dropped from consideration as no interest has been expressed. Radio Vergennes provides a showing that the

allocation of Channel 294C2 at Vergennes could provide a first fulltime aural service to an area of approximately 128 square miles with 1,500 people and a second fulltime aural service to an area of approximately 280 square miles with 13,000 people. This study has not been confirmed by staff analysis. Rather we seek comments on the accuracy of this showing. Although Channel 294C2 cannot be used at its present location, Radio Vergennes states that it will seek a waiver of the mileage requirements and if that is not granted it will move its transmitter location. In the *First Report and Order,* we have allotted Channel 278A to Plattsburgh instead of Channel 294A. Thus, Channel 294C2 can be assigned to Vergennes without a conflict to any pending proposals.

8. In accordance with our established policy, we shall propose to modify the license of Station WIZN (Channel 294A) to specify operation on Channel 297C2. However, should another party indicate an interest in the Class C2 allotment, then modification may not be implemented. See, *Cheyenne, Wyoming, supra.*

LaCrosse, Wisconsin

9. May Broadcasting Company ("May"), licensee of Station WSPL-FM, Channel 240A, LaCrosse, Wisconsin, filed a counterproposal for the allotment of Channel 239C2 and modification of its license to specify operation on the new channel. May's proposal conflicts with the Commission proposal to allot Channel 238A to Cresco, Iowa, since the communities are only 72.1 kilometers (45 miles) apart and the mileage separation requirements specify 105 kilometers (65 miles). May asserts that its proposal would better serve the public interest since it could provide: (1) a first aural service to an area of 3 square miles with a population of 51; and (2) a second aural service to an area of 235 square miles with a population of 4,490. This study has not been confirmed by staff analysis. Rather we seek comments on the accuracy of this showing. May urges the adoption of its proposal since an engineering study indicates that the only opportunity for upgrading its facilities is on Channel 239C2 using a transmitter site to the south of LaCrosse, Wisconsin. Channel 239C2 can be assigned to LaCrosse with a site restriction of 12.3 miles south.

10. A staff engineering study indicates that another channel (272A) can be allotted to Cresco, Iowa. We have done so in the *First Report and Order* in this proceeding.

11. As stated previously, should another party indicate an interest in the Class C2 allotment for LaCrosse, the proposed modification may not be implemented. See, *Cheyenne, Wyoming,* supra.

Kinston, North Carolina

12. Farmers Broadcasting Service, Inc. ("Farmers") submitted a counterproposal requesting the allocation of Channel 254A to Kinston,

North Carolina, in lieu of our proposal to assign that channel to Jacksonville, North Carolina. That request was returned as unacceptable as it would not have afforded Station WRQK (Channel 254) Greensboro, North Carolina, the full 16 kilometer buffer zone as mandated in the *Memorandum Opinion and Order* in BC Docket 80-90, 49 Fed. Reg. 10260, published March 20, 1984. It was also noted that Kinston currently has fulltime local service from FM Stations WRNS and WQFW and AM Stations WFTC and WISP and therefore the proposal did not fit any of the categories specified for acceptance.

13. In its original filing, Farmers conceded that the use of Channel 254A would not provide the full 16 kilometer buffer zone to Station WRQK but asserted that the Greensboro station would agree to waive its right to use the buffer in the direction of Kinston. However, there was no submission by the licensee of Station WRQK attesting to that fact. On July 18, 1984, Farmers submitted a petition for reconsideration of our dismissal of its counterproposal and provided the Commission with a letter from the licensee of Station WRQK, A.H. Robins Company, stating that it waived its interest in use of the buffer zone since it had no intention of moving its transmitter any closer to Kinston than its present location. Based on that letter and a clarification from Farmers that it did indeed intend to provide minority-oriented service should it become the ultimate licensee, we now believe that the counterproposal is acceptable for consideration in this proceeding. We hereby request comments from interested parties on the proposals to assign FM Channel 254A to either Jacksonville or Kinston.

14. The allotment of Channel 254A at Jacksonville could provide that community with its third local FM service. Expressions of interest in use of a Jacksonville allocation were filed by June G. Fuss, James Jarman, Eric R. Spencer, James Capers, Jr., Chuck Harris, Harold Foster, Brad M. Kelley and George W. Bott. Jarman stated in his letter of intent that he would provide minority-oriented service to that community. Further, the National Association of Black-Owned Broadcasters requested that should no letters of interest in use of the Jacksonville allocation be received by the comment deadline, that the community nevertheless remain on the list of new allotments so as to provide Jacksonville minority-oriented service.

15. The allotment of Channel 254A to Kinston could provide that community with its third local FM service. As stated earlier, Farmers proposes service to a minority population of 13,408 persons.

16. Channel 254A can be allotted to Jacksonville without any site restriction. In addition, we note that Channel 254C1 could be allotted with a site restriction of 18.9 miles southeast. The proposed Channel 254A at Kinston would require a site restriction of at least 7.9 kilometers (4.9 miles) south of the community.

South Pittsburg, Tennessee

17. Marion County Broadcasting Service, Inc., licensee of daytime-only AM Station WEPG, South Pittsburg, Tennessee, requests the allotment of Channel 300C2 to its community. The proposal meets the category of provision of a first fulltime local service for the community but was previously rejected for non-compliance with the distance separation requirements. In particular it appeared that no site could be found that could meet the separations to Station WABD-FM, Fort Campbell, Kentucky; Station WENN-FM, Birmingham, Alabama (including these station's buffer zones) and Station WIVK-FM, Knoxville, Tennessee. However, the Commission's staff was able to determine in response to Marion County's petition for reconsideration that a site located 29 kilometers (18.1 miles) SE would avoid the identified spacing constraints.

18. The South Pittsburg proposal would conflict with the Commission's proposal to allot Channel 300A to Calhoun, Georgia and counterproposals for Channel 300A at East Ridge and Jasper, Tennessee. Thus these proposals will also be considered in this *Further Notice.* Marion County has suggested in the alternative that Channel 300 could be allotted to South Pittsburg as a Class A Channel. Comments are requested on the comparative factors involving these communities including the availability of other channels.

19. In view of the above, the Commission believes it is appropriate to solicit comments on the proposals to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the following communities:

City	*Channel No*	
	Present	*Proposed*
Calhoun, Georgia	—	300A
Corbin, Kentucky	257A, 296A	257A, 297C2
Jacksonville, North Carolina	221A, 288A	221A, 254C1 or 254A, 288A
Kinston, North Carolina	236, 249A	236, 249A, 254A
East Ridge, Tennessee	—	300A
Jasper, Tennessee	—	300A
Jellico, Tennessee	—	294A
South Pittsburg, Tennessee	—	300C2 or 300A
Vergennes, Vermont	292A	294C2
LaCrosse, Wisconsin	227, 240A, 285A	227, 239C2, 285A

20. Interested parties may file comments on or before February 28, 1985, and reply comments on or before March 15, 1985, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel, or consultant, as follows:

Calhoun Proponents

Dr. Leon Gresham
c/o Abbott B. Lipsky, Jr.
King & Spalding
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-4706

Julia N. Frew
Route 4
Cartersville, Georgia 30120

Emma Jo Stocks
c/o Robert B. Jacobi
Cohn and Marks
Suite 600
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Louis Frey, Jr.
139 Genius Drive
Winter Park, Florida 32789

Corbin, Kentucky

Crawford Broadcasting, Inc.
c/o Marvin Rosenberg
David G. Rozzelle
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Vergennes, Vermont

Radio Vergennes, Inc.
c/o William M. Barnard
Kenkel, Barnard & Edmundson, P.C.
1220 19th Street, N.W.
Washington, D.C. 20036

East Ridge, Tennessee

Louis Todd
c/o Sterling Communications, Inc.
Uptain Building, Suite 418
Chattanooga, Tennessee 37411

Roy Davis
c/o Omni Communications
One Regency Square,
Suite 450
Knoxville, Tennessee 37915

Jasper, Tennessee

Roy Davis
c/o Omni Communications
One Regency Square, Suite 450
Knoxville, Tennessee 37915

Jellico proponents

Forrest Dean Coleman
c/o Richard J. Hayes, Jr.
Box 38 Star Route No. 3
Phippsburg, Maine 04562

James F. Stair, II
503 Westbury Drive
Clinton, TN 37716

John Clifton
Indian Mountain Rd
Jellico, Tennessee 37762

Robert Maiden
Fifth Street
Jellico, Tennessee 37762

LaCrosse, Wisconsin

May Broadcasting Company
c/o James A. McKenna, Jr.
McKenna, Wilkinson, & Kittner
1150 17th Street, N.W.
Washington, D.C. 20036

Jacksonville proponents

June G. Fuss
425 Meadowbrook Drive
McDonough, GA 30253

James Jarman
3219 Carey Road, Apt. 4A
Kinston, NC 29501

Eric R. Spencer
405 Washington Avenue
Vinton, VA 24179

Brad M. Kelley
P.O. Box 537
Franklin, KY 42134

James Caspers, Jr.
5106 Wrightsville Avenue
Wilmington, NC 28403

Chuck Harris, Vice President
Capital City Communications,
7221 Russell Road
Durham, NC 27705

Harold Foster
P.O. Drawer AM
Jacksonville, NC

George W. Bott, President
Krisar, Inc.
P.O. Box 98
Guilderland Center, NY 12085

Kinston Proponent

Farmers Broadcasting Service, Inc.
c/o Booth, Freret & Imlay
Suite 520
1920 N Street, N.W.
Washington, D.C. 20036

21. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, §73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 Fed. Reg. 11549, published February 9, 1981.

22. For further information concerning this proceeding, contact Mark Lipp, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making other than comments officially filed at the Commission or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte*

presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Appeal, Procedural Requirements
Interlocutory Ruling, Appeal From

Review Board dismisses appeal because applicant has not demonstrated compliance with Section 1.301 of the Commission's Rules.

—*Horizon Community B/cers, Ltd.*
MM Docket No. 84-1031

FCC 85R-38

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Horizon Community Broadcasters, Ltd.	MM Docket No. 84-1031 File No. BPCT-840710KG
Inter American Broadcasting Company	MM Docket No. 84-1032 File No. BPCT-840711KE
Victory Media, Inc.	MM Docket No. 84-1033 File No. BPCT-840711KF
Johnson Broadcasting, Inc.	MM Docket No. 84-1034 File No. BPCT-840711KI
Louise Brunson	MM Docket No. 84-1035 File No. BPCT-840711KO
For Construction permit for New Television Station Katy, Texas	

MEMORANDUM OPINION AND ORDER

Adopted: May 2, 1985; Released: May 6, 1985

BY THE REVIEW BOARD:

1. The Review Board has under consideration an "Emergency Appeal," filed March 20, 1985 by Johnson Broadcasting, Inc. (Johnson) from a *Memorandum Opinion and Order*, FCC 85M-1011, released March 12, 1985, in which the presiding Administrative Law Judge (ALJ) denied a request to dismiss the application of Inter American Broadcasting Company (Inter American) for alleged deficiencies.[1] Accompanying the "Emergency Appeal" is a "Motion to Accept Emergency Appeal" filed simultaneously by Johnson. The Mass Media Bureau filed an opposition on March 29, 1985 to the motion to accept the appeal, arguing that the appeal itself is not properly before the Board, but requesting permission to respond to the merits of the appeal should Johnson's motion be granted. Inter American filed an opposition on March 27, 1985 to both of Johnson's pleadings.

2. We will deny the Johnson motion and dismiss the emergency appeal because Johnson has not demonstrated compliance with Section 1.301 of the Commission's Rules, 47 CFR §1.301, which governs appeals from a presiding officer's interlocutory rulings. That section provides, in pertinent part, that except for rulings which are appealable as a matter of right (not applicable here[2]), "appeals from interlocutory rulings of the presiding officer shall be filed only if allowed by the presiding officer." Where, as here, consent was neither sought nor obtained from the ALJ, the appeal will not be considered unless the appealing party has demonstrated a flagrant abuse of discretion "as would inevitably require a reversal of the Initial Decision and a hearing *de novo*; or where the proceeding involves basic and far reaching considerations of public policy and vital concerns relating to the public interest which could not otherwise adequately be protected." *Communications Satellite Corp.*, 32 FCC 2d 533, 534 (1971). Johnson's appeal raises neither of the concerns adverted to in *Communications Satellite Corp., supra.*[3]

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[1] The request was filed by Victory Media, Inc., which does not seek review of the ALJ's ruling here.

[2] Johnson is in error in claiming that Section 1.301(a)(1), which allows a person an automatic appeal from a ruling by an ALJ denying the right of that person to participate as a party to a hearing proceeding, also permits an appeal as of right when a request to dismiss a competing application is denied. *Cf. Pleasant Broadcasting Co.*, 30 FCC 2d 815, 22 RR 2d 412 (Rev. Bd. 1971).

[3] Other minor infirmities are present as well, namely, Johnson's 12 page appeal exceeds the 5 page limit set forth in Section 1.301(c)(5); and its reply to oppositions is unauthorized under Section 1.301(c)(7).

3. ACCORDINGLY, IT IS ORDERED, That the Motion to Accept Emergency Appeal, filed March 20, 1985, by Johnson Broadcasting, Inc. IS DENIED, and the Emergency Appeal filed on the same date by Johnson Broadcasting, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

Agreement Between Applicants
Application, Processing of
Settlement

> Settlement agreements between low power television or television translator applicants which provide for the amendment and reinstatement of a low power television or television translator application previously returned as defective will not be considered or approved. *Howard LP. TV, Inc.*

FCC 85-259

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of

Howard LP Television, Inc.

For a Construction Permit for a New
Low Power Television Station on
Channel 9,
Twin Falls, Idaho

File No.
BPTVL-810217JU

MEMORANDUM OPINION AND ORDER

Adopted: May 14, 1985; Released: May 17, 1985

BY THE COMMISSION:

1. The Commission has under consideration on Application for Review filed by Howard LP Television, Inc. ("Howard"). Howard requests review of Mass Media Bureau ("Bureau") actions denying Howard's petition for reconsideration and returning its above-captioned application.[1]

2. Howard tendered its application for Channel 9, Twin falls, Idaho, on February 17, 1981. The application was returned as defective by the Bureau on September 2, 1983, because its proposed facility was predicted

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[1] An opposition to Howard's Application for Review was filed by Orion Broadcast Group, Inc.; a reply to that opposition was filed by Howard. Although Orion is not a party in interest under Section 309 of the Communications Act of 1934, as amended, these pleadings will be considered under the public interest standard of Section 309(a) of the Act.

to interfere with licensed co-channel television translator station K09HS, Channel 9, Glenns Ferry, Idaho, in violation of interference standards set forth in Section 74.707 of the Commission's Rules.

3. Howard petitioned for reconsideration on October 4, 1983, and submitted concurrently an amendment designed to eliminate the predicted interference to K09HS and a settlement agreement between Howard and the State Board of Education and Board of Regents of the University of Idaho ("Idaho"). The proposed settlement agreement provided for the dismissal of Idaho's directly mutually exclusive application for Channel 9, Thousand Springs, Idaho (file no. BPTTV-801014IA). Howard stated that dismissal of Idaho's application would make Howard's application grantable because it would not be mutually exclusive with any other application, and contended that its amendment should be accepted and its application reinstated so that its amended application could be granted immediately after approval of the settlement agreement. The Bureau denied reconsideration and again returned Howard's application, stating that a defective application subsequently retendered with a correcting amendment cannot be reinstated *nunc pro tunc* under the complete and sufficient application acceptance standard of the low power television service. The Bureau further stated that Howard's proposed settlement agreement was mooted by the return of its application, since Howard's application had been returned before the settlement agreement was submitted to the Commission.

4. In its application for review, Howard again contends that its amended application should be reinstated, its settlement agreement approved and its construction permit application granted. However, the Bureau's disposition of Howard's application was entirely consistent with the Commission's Rules. We have held on numerous occasions that the complete and sufficient application acceptance standard set forth in Section 73.3564 of the Commission's Rules means that applications must be letter perfect when tendered. *See, e.g., Low Power Television Report and Order*, 51 RR 2d 476 (1982), *recon. granted in part*, 53 RR 2d 1267 (1983); *American Christian Television System, Inc. (Channel 50, Vero Beach, Florida)*, 56 RR 2d 1445 (1984); *Kinetications, Inc.*, 56 RR 2d 1402 (1984); *Telecrafter Corporation*, 57 RR 2d 1127 (1985); *Citizen Television Corporation*, FCC 85-83, released February 27, 1985. If the facility proposed in an application is predicted to interfere with the operation of a licensed co-channel television translator station, the application must be returned as defective pursuant to Section 73.3566 of the Commission's Rules[2] and cannot be reinstated *nunc pro tunc* by the acceptance of a

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[2] Section 73.3566 of the Commission's Rules provides in pertinent part, "Applications which are determined to be patently not in accordance with the FCC rules . . . will be considered defective and will not be accepted for filing."

correcting amendment. *Kinetications, Inc., supra.*[3] Howard does not question the validity of the Commission's interference analysis which predicted the interference to K09HS. Moreover, Howard failed to take advantage of the 1982 ninety day amendment period[4] to remedy any predicted interference with K09HS or other co-channel stations.[5] Indeed, Howard does not contend in this proceeding that the conflicts with these co-channel television translators could not have been resolved by an appropriate amendment at that time. In the face of Howard's failure to act, no equities exist that would justify reinstating its amended application in contravention of our processing rules.

5. The Bureau was also correct to disregard the proposed settlement agreement between Howard and Idaho in denying Howard's petition for reconsideration. The Commission has never been required to keep on file applications that do not meet the relevant processing standard and cannot be granted. *See Radio Athens, Inc. (WATH) v. FCC,* 401 F.2d 398, 401 (D.C. Cir., 1968). Consideration and approval of a settlement agreement which provides for the amendment, reinstatement *nunc pro tunc* and grant of a low power television application returned as incomplete or defective would enable an applicant to vitiate the complete and sufficient application acceptance standard and evade the window filing procedure by using a settlement of this type as a means to cure the defect(s) in its application. This practice, if allowed, would amount to a *de facto* waiver of the acceptance standards and filing procedures for any applicant that could conclude a settlement with its competing applicants.

6. We determined in the low power television rulemaking that the public interest would best be served by rigorous adherence to our application acceptance standards. *Low Power Television Report and Order, supra.* As we have stated in subsequent decisions, the reprocessing of an application retendered with a correcting amendment could necessitate the reprocessing of all other applications with which it is both directly and indirectly mutually exclusive. This reprocessing could greatly delay all low power television and television translator application

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[3] Since September 15, 1983, no new or major change applicant for a low power television or television translator station may resubmit its application unless the applicant is the licensee of an existing translator station and is seeking a frequency change from channels 70—83 to a lower channel or is seeking a frequency change to eliminate interference caused to or received from a newly operational full service television station. This situation is attributable to our application filing freeze and to our subsequent institution of the window filing procedure in the service. *See Order Imposing Freeze,* FCC 83-423, released September 19, 1983; *Low Power Television Service (Filing Windows),* 57 RR 2d 234, 235-37 (1984).

[4] *Low Power Television Service (Amendment Period),* 51 RR 2d 1275 (1982).

[5] Howard's application is also predicted to interfere with co-channel television translator stations K09IR, Channel 9, Albion, Idaho, and K09OZ, Channel 9, Fairfield, Idaho.

processing and impede substantially the licensing process and provision of low power television and television translator service nationwide. *See Rochelle C. Salzer*, 56 RR 2d 1398 (1984); *Kinetications, Inc., supra; Citizen Television Corporation, supra.*

7. Howard contends that the public interest would be better served here by reinstatement of its amended application and approval of its settlement agreement so that the competition for Channel 9 in Twin Falls would be resolved entirely and low power television service might be brought more quickly to Twin Falls, a community with only one full service television station, KMVT(TV). However, even if Howard's application was reinstated, it would still be directly mutually exclusive with the pending co-channel low power television application of Russell Communications ("Russell") for Channel 9 in Twin Falls (file no. BPTVL-820423RN). Because Russell was not a party to the settlement agreement, reinstatement of Howard's application and approval of the settlement agreement would neither obviate the need for a lottery nor speed the award of a construction permit to one of the competing applicants. Moreover, Howard's characterization of the paucity of television service in Twin Falls is inaccurate. Commission records indicate that Twin Falls receives off-air television service from two licensed television translators as well as from full service television station KMVT(TV).[6] Additionally, five construction permits have been granted to build new low power television stations in Twin Falls.[7] It is expected that these stations will begin operating within the next year. In view of this situation, Howard's public interest rationale for reinstatement of its application and approval of its settlement agreement fails completely.[8]

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[6] The two television translator stations are K13LR, Channel 13, and K51AU, Channel 51, both licensed to operate in Twin Falls.

[7] Construction permits have been issued to build low power television stations K27A0, Channel 27; K33AI, Channel 33; K38AS, Channel 38; K49AZ, Channel 49; and K60CI, Channel 60. All five construction permits specify operation in Twin Falls.

[8] Howard also argues that its case is similar to that which led to the grant of low power television station W07BP, Channel 7, Ocala, Florida, licensed to Florida City Television, Inc. ("Florida City"). However, that case contained significant factual differences. Florida City concluded and submitted a settlement agreement with its sole competing applicant before either application was processed. The settlement agreement was approved, leaving Florida City's application not mutually exclusive with any other application. During a final engineering review of the application, a slight contour overlap was discovered with full service television station WJCT(TV), Channel 7, Jacksonville, Florida, which Florida City rectified with a minor amendment. The application was then granted. In contrast with Florida City's settlement agreement, Howard's agreement did not include all applications with which its application was mutually exclusive and was submitted only after its application had been returned as defective. Additionally, accepting Florida City's minor application amendment was in the public interest, unlike Howard's application amendment, because additional television service could be authorized immediately after its acceptance.

8. Based on the foregoing, we believe that the Bureau fully considered and properly decided the matter. Consequently, Howard's application for review will be denied.

9. Accordingly, IT IS ORDERED, That pursuant to Section 1.115 of the Commission's Rules, the Application for Review filed by Howard LP Television, Inc. IS DENIED.

10. IT IS FURTHER ORDERED, That the Mass Media Bureau send a copy of this *Memorandum Opinion and Order* by Certified Mail — Return Receipt Requested to the applicant named herein.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Application, Processing of
Television, Low Power
Translator

The predicted contour of a full service television station authorized by construction permit is protected from interference in low power television and television translator application processing for the duration of the permit.
Neighborhood TV Co., Inc.

FCC 85-262

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of Neighborhood TV Company, Inc. For Construction Permits for New Television Translator Stations to Operate on	
Channel 54 Evanston, Illinois	File No. BPTT-800908JI
Channel 26 Bridgeport, Connecticut	File No. BPTT-800905IL
Channel 52 Kalamazoo, Michigan	File No. BPTT-801021ID
Channel 60 Worcester, Massachusetts	File No. BPTT-800919IO
Channel 62 Boston, Massachusetts	File No. BPTT-800910IQ
Channel 64 Albany, New York	File No. BPTT-800919IL
Channel 26 New London, Connecticut	File No. BPTT-801027IJ
Channel 56 Lexington, Kentucky	File No. BPTT-801113IA

MEMORANDUM OPINION AND ORDER

Adopted: May 14, 1985; Released: May 17, 1985

BY THE COMMISSION:

1. The Commission has before it Applications for Review filed by Neighborhood TV Company, Inc. ("NTV") of Mass Media Bureau staff actions denying NTV's petitions for reconsideration of the return of its eight above-captioned applications.

2. Preliminary study of NTV's applications indicated that the facilities proposed therein were predicted to interfere with authorized full service television stations in violation of interference standards set forth in Section 74.705 of the Commission's Rules. Consequently, NTV's applications were returned as unacceptable for filing.[1]

3. NTV petitioned for reconsideration in each case and argued that return of its applications was improper because the Commission's low power television and television translator interference rules do not require the return of an application when the proposed facility is predicted to interfere with a full service television station that has been granted a construction permit but is not yet operating. NTV further claimed that its application for Channel 54, Evanston, Illinois, should be reinstated because the only predicted interference to co-channel full service television station WMKT(TV) would occur over Lake Michigan and thus would not interfere with viewer reception of either WMKT(TV) or of NTV's proposed facility.

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[1] Following is a list of NTV's applications and the authorized full service television stations with which they were predicted to interfere:

Channel 54, Evanston, Illinois/ with WMKT(TV), Channel 54, Muskegon, Michigan;
Channel 26, Bridgeport, Connecticut/ with WLCT(TV), Channel 26, New London, Connecticut;
Channel 52, Kalamazoo, Michigan/ with WGVK(TV), Channel 52, Kalamazoo, Michigan;
Channel 60, Worcester, Massachusetts/ with WGOT(TV), Channel 60, Merrimack, New Hampshire;
Channel 62, Boston, Massachusetts/ with WMFP(TV), Channel 62, Lawrence, Massachusetts;
Channel 64, Albany, New York/ with WTZA(TV), Channel 63, Kingston, New York;
Channel 26, New London, Connecticut/ with WLCT(TV), Channel 26, New London, Connecticut;
Channel 56, Lexington, Kentucky/ with WDKY(TV), Channel 56, Danville, Kentucky.

Full service television station WGVK(TV), Channel 52, Kalamazoo, Michigan, was licensed on January 31, 1985. The construction permits of each of the other full service television stations are still valid.

4. The Bureau denied NTV's petitions for reconsideration on the ground that the low power television and television translator interference rules protect authorized stations as well as licensed stations. The Bureau stated that nonprotection of the contours of authorized stations would result in the tendering and acceptance for filing of applications that would become instantly defective and unacceptable whenever authorized stations became licensed and in pointless processing of a great number of such applications, to the detriment of the service. The Bureau noted in its letter denying reconsideration of the return of NTV's Evanston application that the location of the predicted interference to full service television station WMKT(TV) over Lake Michigan was inconsequential, since additional study revealed that NTV's application was also predicted to interfere with another authorized full service television station, WKRW(TV), Channel 55, Kenosha, Wisconsin.[2] That area of interference would occur over land.

5. In its applications for review, NTV reiterates its contention that the low power television and television translator interference rules do not contemplate the return of an application when studies predict interference to an authorized but as yet unlicensed full service television station. In support, NTV cites Section 73.681 of the Commission's Rules, which it claims sets forth a definition of a full service television station as one that is actually broadcasting. From this, NTV concludes that protection of authorized full service television stations in low power television and television translator interference analysis is limited only to licensed and operating stations by the Rules.

6. However, we believe that the Bureau correctly applied the low power television and television translator interference prediction rules in returning NTV's applications. While Section 73.681 of the Rules defines "Television broadcast station" as a "station . . . transmitting simultaneous visual and aural signals intended to be received by the general public," that definition serves only to distinguish television broadcast stations from other types of stations. It does not establish dividing lines between those stations under construction, those conducting equipment tests, those operating under authority of a license, and those licensed but temporarily not operating. Moreover, the low power television and television translator predicted interference standards set forth in Section 74.703(a) of the Rules mandate return of an application "when it is apparent that interference will be caused." Neither Section 74.703(a) nor any other rule section governing the low power television and television translator service indicates that only the contours of licensed and operating stations will be protected from interference. Such an interpreta-

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[2] The construction permit of WKRW(TV) was granted on November 21, 1983 (file no. BPCT-820909KG) and is still valid.

tion is directly contrary to the Commission policy of protecting the frequencies and contours of full service television, low power television and television translator facilities authorized by construction permits against interference predicted to occur from proposed low power television or television translator operations for the duration of those permits. *See Notice of Proposed Rulemaking*, 82 FCC 2d 47, 67-69 (1980); *Low Power Television Report and Order*, 51 RR 2d 476, 491 (1982); *Low Power Television Service (Filing Windows)*, 57 RR 2d 234, 243 (1984) (elimination of preference for 1000 watt television translators on assigned channels where full service television stations are authorized but not operating).[3]

7. We have stated on numerous occasions that the public interest is best served by strict adherence to our processing rules so as to assure the expeditious institution of the low power television service. Increasing the backlog of low power television and television translator applications and the concomitant strain on the Commission's limited processing resources by accepting for filing applications which are predicted to interfere with authorized full service television stations would counteract that public interest determination. *See, e.g., Kinetications, Inc.*, 56 RR 2d 1402 (1984); *Garnerlynn Communications*, FCC 84-614, released December 7, 1984; *Las Manzanas Television Company*, FCC 84-570, released January 11, 1985; *Telecrafter Corporation*, 57 RR 2d 1127 (1985). More importantly, under NTV's interpretation of the interference rules, a low power television or television translator station could be granted its permit, become operational and licensed before an authorized full service television station begins transmitting. Harmful interference resulting in disruption of service to the public could then be caused to authorized full service television stations conducting program tests or operating under program test authority.[4] This interference would in many cases force the discontinuance of the low power television or television translator station's operation and the loss of the substantial investment made by the permittee or licensee of the station. Additionally, it would significantly impact upon the manpower and budgetary resources of the Field Operations Bureau by necessitating field investigations to terminate operation of the interfering low power television or television translator stations.

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[3] *See also* Section 1.106(e) of the Commission's Rules, which notes requirements for petitions for reconsideration "based upon a claim of electrical interference . . . to an existing station *or a station for which a construction permit is outstanding*." [Emphasis supplied.]

[4] A full service television permittee may conduct program tests merely by notifying the Commission, provided that it files a license application within ten (10) days of the commencement of program tests. Program test authority continues during Commission consideration of the license application. *See* Section 73.1620 of the Commission's Rules.

8. We conclude that the acceptance for filing or grant of a low power television or television translator construction permit application that is predicted to interfere with an authorized full service television station would be contrary to the Commission's rules and policies and wasteful of the resources of both applicants and the Commission. Therefore, the Bureau properly processed and returned NTV's applications as defective pursuant to Sections 74.705 and 73.3566 of the Commission's Rules.

9. Accordingly, IT IS ORDERED, That pursuant to Section 1.115 of the Commission's Rules, the Applications for Review filed by Neighborhood TV Company, Inc., ARE DENIED.

10. IT IS FURTHER ORDERED, That the Mass Media Bureau send a copy of this *Memorandum Opinion and Order* by Certified Mail — Return Receipt Requested to the applicant named herein.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Construction Permit, Extension of
Construction Permit, Transfer of

Where a third application for extension of time to construct TV station is filed, the pendency of an assignment application does not automatically entitle permittee to grant of the extension.
New Orleans Channel 20, Inc.

Del. Auth. 85-02

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

New Orleans Channel 20, Inc. 311 Ridge Road East Rochester, New York 14621	Re: BMPCT-840710KH BAPCT-840727KG WULT-TV New Orleans, LA

Adopted: June 4, 1985; Released: June 10, 1985

Gentlemen:

This refers to the above-captioned applications for an extension of time within which to construct Station WULT-TV, New Orleans, Louisiana, and for consent to assignment of the construction permit, a petition to deny[1] each of the applications, field by Marvin Gorman Ministries, Inc. (MGMI), and related pleadings.

The Commission granted the construction permit for Channel 20 on October 10, 1980, following a settlement agreement among three competing applicants. An application for assignment of the construction permit was granted on January 25, 1982. The assignment was not consummated and on March 15, 1983, a second assignment application was granted, and was consummated on June 28, 1983. On August 9, 1983, the Commission granted the permittee's application for a six month extension of time to construct. No construction was undertaken following any of the grants. On February 8, 1984, the Commission granted an additional six month extension of time to construct, subject to the condition that, not later than May 9, 1984, you would file a progress report with the Commission. By letter dated May 9, 1984, rather than submitting a progress report, you informed the Commission that because of the drain on your time and resources and lack of success in obtaining a suitable construction site, you had decided to assign the permit to another entity better able to pursue construction of the station. Consequently, you have once again requested an extension of time to construct in order to assign the permit to another entity. It again appears that no construction has been undertaken. You state that the proposed assignee stands ready to pursue construction of the station once the assignment application is approved.

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[1] Applications for extension of time to construct are not subject to petitions to deny. Therefore, the petition to deny the extension of time application will be treated as an informal objection filed pursuant to Section 73.3587 of the Commission's Rules.

In its objections, MGMI contends that you have had ample time in which to secure a site, have failed to do so, have received two extensions previously for failure to find a site, and that you have made little effort to procure a transmitter site. Under these circumstances, MGMI argues that you should not be allowed to profit from the sale of the construction permit which would result if the Commission grants the requested extension. MGMI alleges that you have not been diligent in your efforts to secure a transmitter site, and that you assertion that you have, lacks credibility. MGMI points out that several of its officers know of available sites for a transmitter, and that ten other applicants for Channel 49 in New Orleans have specified available sites. MGMI notes that two of the principals of New Orleans Channel 20, Inc. have been holders of the construction permit for Channel 20 since 1980. Therefore, MGMI argues, it is unreasonable to believe that these principals could not have produced a transmitter site within this four year time span. Further, MGMI states that the public interest has been successively undercut by your continuing attempt to hold on to the construction permit. MGMI asserts that your failure to construct over the past four years has removed the channel from the community and prevented any other party from applying to use it.

In opposition, you state that the objections are not based on the present set of circumstances, but on the previous extension applications and the previous applications for assignment of the construction permit which cannot be revisited. You argue that the public interest would be served by extending the construction permit and allowing the station to go on the air promptly. You assert that the public interest would not be served by opening up the channel for multiple competing applications. You note that LeSea Broadcasting, the proposed assignee, has committed itself to constructing the station, and it hopes to have the station on the air in seven months.[2]

Additionally, you maintain that past Commission cases make it clear that an extension of time is appropriate where a permittee that has not constructed a station proposed to assign the permit to a party that is prepared to proceed with construction. *Gross Broadcasting Co.*, 41 FCC 2d 729 (1973) *New Television Corp.*, 65 FCC 2d 680 (Rev. Bd. 1977); *Hymen Lake*, 56 FCC 2d 379 (Rev. Bd. 1975). You state that in the past, where there has been a firm commitment from the proposed assignee to construct and the probability of early inauguration of UHF television service, as here, the Commission has consistently found that the public interest would be served by extending the time for construction. You contend that the extension and assignment of the Channel 20 permit would bring new television service to New Orleans at the earliest opportunity. Further, you allege that MGMI has failed to offer any support for its legal position and has provided no basis for overturning long-established Commission policy.

In reply to your opposition, MGMI maintains that you not submitted any showing of circumstances beyond your control which prevented construction and, therefore, the permit should be forfeited. MGMI alleges that in the 11 months you have controlled the permit, you have made no discernable effort to find a site, order equipment, or to begin any type of television operation in New Orleans. Yet, MGMI states, you now hope to receive $250,000 for transferring the permit to another party.

Before an extension application can be granted, Section 73.3534(a) of the Commission's Rules requires either a specific and detailed showing that the failure to complete construction within the time provided was due to causes beyond a permittee's control or that there are other matters sufficient to justify the extension. In the past, where an assignee made a firm commitment to construct expeditiously and the Commission was persuaded that the assignment represents the fastest way to have the station activated, the pendency of the assignment application can be considered to be such an "other matter." *King Communications, Inc.*, 47 RR 2d 109, 110 (Rev. Bd., 1980). However, the filing of an assignment application does not automatically entitle the permittee to an extension of time to have the station built. Moreover, subsequent to the *King* decision, the Commission has clearly stated that it will take a much closer look at extension applications. *See, e.g., Revision of Form 301*, 50 R.R. 2d 381,

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[2] The proposed assignee states that it has: (1) secured a transmitter site and filed an application to modify the Channel 20 construction permit to specify the new site; (2) placed a contingent order for broadcast equipment in the amount of approximately $2.5 million; (3) located a suitable studio site; and (4) reached agreements in principle with individuals who will be the station's operations manager and chief engineer.

382 (1981); *MEKAOY Co. (KTIE)*, 48 RR 2d 815, 817 (Broadcast Bureau, 1980).

Here, we note that it has been four years since the construction permit was issued for Channel 20. During this time, the Commission has granted two assignment application and two applications for extension of time to construct. Yet, no construction has commenced and it appears that no equipment has been ordered. In granting the last extension of time to construct, the Commission granted the request subject to the condition that not later than May 9, 1984, a progress report would be filed with the Commission. However, on May 9, 1984, you informed the Commission that you had decided to assign the permit to another entity. Thus, on July 10, 1984, you filed an application for extension of time to construct and on July 27, 1984, an application for assignment of the construction permit.

In this case, the permit was assigned to you on the assumption that you would build promptly. The last extension application was approved on the assumption that its grant would expeditiously result in a new service to the public. These expectations have come to nought.

Accordingly, on the basis of the facts set forth in you application, the Commission is unable to find that construction of the station was prevented by causes beyond your control and the Commission does not find the existence of other matters which would warrant an extension. The filing of the assignment application, under the circumstances, does not warrant an extension of time. You are advised that your application for an extension of time within which to construct Station WULT, New Orleans, Louisiana, IS DENIED, your construction permit IS CANCELLED, your call sign IS DELETED, and your application for assignment of the construction permit to LeSea Broadcasting, Incorporated, IS DISMISSED, as moot.

Sincerely,

JAMES C. MCKINNEY, *Chief, Mass Media Bureau*

Common Carrier, International

Notice of Proposed Rulemaking adopted requesting comments on the Commission's proposed policy for the distribution of circuits among North Atlantic cable and satellite facilities during the 1986–1991 period.

North Atlantic Telecommunications
CC Docket No. 79-184

FCC 85-176

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

Inquiry into the Policies to be Followed in the Authorization of Common Carrier Facilities to Meet North Atlantic Telecommunications Needs During the 1985–1995 Period.	CC Docket No. 79-184

SECOND NOTICE OF PROPOSED RULEMAKING

Adopted: April 11, 1985; Released: April 22, 1985

BY THE COMMISSION:

I. Introduction

1. We hereby give notice of a proposed rulemaking to develop guidelines governing the distribution (loading) of circuits among available North Atlantic cable and satellite facilities during the 1986–1991 period. The existing circuit-distribution guidelines negotiated by the United States international service carries and their European correspondents for the North Atlantic region are embodied in the comprehensive facilities construction and use plan developed in Docket No. 18875.[1] Those

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[1] Future Licensing of Overseas Communications Facilities, 73 FCC 2d 326 (1979). *See also* Overseas Communications, 71 FCC 2d 71 (1979). In the earlier phase of this proceeding, *Policies for Overseas Common Carriers*, 84 FCC 2d 760 (1981) (Report and Order), we considered a number of cable and satellite facilities options for the 1985–1995 period and found that the public interest would be served by construction of a digital, optical-fiber submarine cable (TAT-8) to be introduced into service as early as 1988 and by use of either of two proposed designs than under consideration in INTELSAT for the INTELSAT-VI series of satellites. Subsequently, we authorized U.S. participation in the construction of

guidelines, based on the balanced-loading methodology, extend only through year-end 1985. The purpose of this proceeding, then, is to develop distribution (*i.e.*, loading) guidelines governing traffic between the United States and CEPT[2] which can efficiently be implemented beginning January 1, 1986.

2. A fully competitive market does not now exist in the provision of international telecommunications services. Equally important is the fact that certain biases exist in the market which prevent market forces from producing an environment in which costs are minimized, demand is satisfied, service quality is retained, technological development is encouraged and benefits to users are maximized. Therefore, we have tentatively concluded that we should continue to exercise supervision of the activation of cable and satellite circuits during the 1986–1991 period to assure that all facilities in use in the North Atlantic during that period are reasonably and efficiently used.[3] However, we recognize that competition is increasing and that existing biases may, over time, diminish. Therefore, we also tentatively conclude that the public interest would be served by gradually moving away from balanced loading and permit the carriers greater flexibility in making loading decisions. Specifically, we tentatively conclude to continue to exempt from distribution requirements circuits used for international record services and to extend that exemption to new entrants into the international message telecommunications service (IMTS) market. As to the American Telephone and Telegraph Company (AT&T), we tentatively conclude to permit it to increase at a rate of two percent per year over a six-year period the percentage of traffic it routes over cable facilities from 48 per cent to a maximum of 60 per cent. Below we summarize the Third Notice of Inquiry, the comments and reply comments filed in response to the notice, and the joint proposal submitted by the Communications Satellite Corporation (Comsat) and AT&T at the recently-concluded North Atlantic Consultative Working Group Meeting. We then indicate our understanding of the views of our carriers' foreign correspondent, analyze the various options, and reach several tentative conclusions.

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both these facilities: *See* American Telephone and Telegraph Company, FCC 84-240, 98 FC 2d 440 (released June 8, 1984) [TAT-8 Authorization] and Communications Satellite Corporation, File No. CSS-82-001-P, FCC 84-236, ______ FCC 2d ______ (released May 25, 1984) [INTELSAT-VI Authorization].

[2] CEPT is the Conference Europeen des Administrations des Poste et des Telecommunications, an organization of the postal and telecommunications entities of 26 European nations.

[3] Further, we have tentatively concluded that it would be in the public interest to revisit the issue of loading prior to the end of this period. Of course, if conditions warrant we would revisit the issue at an earlier date.

A. Third Notice of Inquiry

3. We initiated this proceeding on August 3, 1984, with the release of our *Third Notice of Inquiry* (Notice), FC 84-351, 93 FCC 2d 1166. In our Notice we set out the history of our involvement in the development of loading guidelines for facilities use. We particularly noted that our desire ultimately to permit carriers greater flexibility in loading decisions had to be balanced with the realization that Comsat is dependent upon AT&T and the international record carriers (IRCs), entities with a clear economic preference for cable usage, for almost all of its traffic. We stated that our goal is to establish an efficient communications network which balances the need for high-quality service, diverse routes and sufficient capacity with the desire for reasonable rates for users. More specifically, we have through our comprehensive facilities planning proceedings sought to achieve the least-cost combination of facilities capable of meeting demand and of maintaining acceptable levels of service quality and reliability. Our pursuit of this goal has led us, in partnership with interested United States carriers and their overseas correspondents, to examine facilities options and costs to achieve what we hope will be the optimal combination of cable and satellite facilities. Central to this effort, of course, is the question of loading — the distribution of traffic between and among cable and satellite facilities.

4. We indicated in the Notice that AT&T is now generally required to distribute the circuits it uses for IMTS among available cable and satellite facilities in accordance with what is known as the "balanced loading" principle.[4] Circuits for international record services (leased-channel, telex, public message service, Datel, etc.) are not subject to any distribution guidelines.

5. In our Notice we identified essentially three policy options we could follow in fashioning loading guidelines for the 1986–1991 period. The first such option would be to continue to use balanced loading. We noted, as we had in Docket No. 18875, that balanced loading is a useful loading mechanism. That is, balanced loading assures that all existing cable and satellite facilities are reasonably used and facilitates restoration planning. Balanced loading also automatically handle sharp deviations of actual from forecasted traffic levels (either shortfalls or overages), without

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[4] The balanced routing (or balanced loading) methodology distributes circuits among facilities with unused capacity in a manner which, to the extent possible, seeks to place equal number of circuits on all transmission systems between the United States and a given country carrying equal numbers of circuits. When one cable or satellite transmission system reaches the limit of its capacity, it falls out of the loading pattern and subsequent growth traffic is equally distributed among the remaining facilities with unused capacity. When a new satellite or cable facility is introduced into service, all additional growth circuits are placed on that facility until it carries as many circuits as the other balanced systems.

unduly prejudicing or benefitting the owners of particular facilities. On the other hand, balanced loading treats all facilities as equal and does not have any mechanism to take into account technological improvements which might make one facility more desirable or efficient than others.

6. The second option we identified would be to remove ourselves immediately from circuit-distribution decisions, leaving the matter entirely to the discretion of the carriers. We noted that we have already done this in Docket No. 18875 with respect to record services, merely requiring the record carriers to provide us with their expected distributions, and speculated that it might be possible to adopt the same approach for IMTS circuits. We further noted that such a course would give U.S. carriers flexibility to negotiate actual distributions with their overseas correspondents as well as to meet their service and economic needs. We emphasized, however, that our concern is the interest of the user, not the carriers, and that it is not clear that unfettered carrier discretion would necessarily service user interests. International communications are now in transition. Although there have recently been new entrants, the market is not yet competitive: IMTS accounts for 89 per cent of all cable and satellite circuits in use in the North Atlantic and AT&T accounts for in excess of 99 per cent of those IMTS circuits. Also, as a rate-base-regulated entity, AT&T has a bias in favor of facilities it can own (cable) and on which it may earn a return, as compared to facilities it can only lease (satellite) and treat as an expense. We further noted that AT&T's position as a manufacturer of submarine cable systems gives it a pro-cable bias not related to relative costs. Additionally, our 1966 *Authorized User I* decision has required Comsat to lease circuits only to carriers and, thus, prevented it from developing its own customer base.[5] As a result, while we reaffirmed that a "no guidelines" policy might be a valid long-term goal, we indicated that an immediate Commission withdrawal may not be feasible.

7. The third option we identified would be to develop a new distribution mechanism which would increase carrier flexibility and discretion, and reduce Commission involvement in loading decisions, but which would allow us to retain sufficient authority to assure that user interests are protected. We have previously in this proceeding and in Docket No. 18875 considered some alternative guidelines which might be useful and the number of potential approaches is virtually limitless. In particular, we stated in the Notice that loading guidelines might focus solely on AT&T, giving other IMTS carriers and the international record carriers complete freedom to use whatever facilities they feel will best satisfy their requirements. We also indicated that the parties might wish to consider

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[5] *See* Authorized Users and Authorized Entities, 4 FCC 2d 421 (1966) [Authorized User I], *reconsid. grtd in part,* 6 FCC 2d 1446 (1967).

the use of arbitrary cable/satellite ratios, the prescription for use of absolute number of cable and satellite circuits, or phase-ins and that they might wish to approach circuit distribution on either a country-by-country or on a region-wide basis.

B. Summary of Comments

8. In our Third Notice we directed interested U.S. international service carriers and Comsat to file information and comments on the designated issues. We directed the parties to make four separate filings. First, we directed the carriers to file their traffic forecasts for the planning period. Second, we directed the parties to file proposed circuit distributions and comments on the three policy options we presented in our Notice. Third, we directed the parties to file analyses of the proposed circuit distributions filed in the second round. Fourth, we directed the parties to file "final comments" on the plans and the filings of other parties.

9. In response to our Notice, carriers filed updated traffic forecasts on August 31, 1984. On September 14, 1984, we received initial comments and circuit distributions from AT&T, Comsat,[6] GTE Service Corporation (on behalf of its wholly-owned subsidiary the Hawaiian Telephone Company), GTE Sprint Communications Corporation (GTE Sprint), ITT World Communications Inc. (ITTWC), RCA Global Communications, Inc. (RCAGC), and TRT Telecommunications Corporation (TRT).[7] On September 14, 1984, we also received comments on the policy issues in our Notice from two non-carrier respondents: the National Telecommunications and Information Administration in the United States Department of Commerce (NTIA) and Aeronautical Radio, Inc. (ARINC), a large user of international telecommunication services.[8] On October 10, 1984, we received comments from ARINC, AT&T, Comsat, and NTIA. On November 2, 1984, we received comments from ARINC, AT&T, Comsat, ITTWC, NTIA, RCAGC and Satellite Business Systems (SBS). Finally, on November 1, 1984, AT&T filed a revised traffic forecast in which it reduced its estimate of circuit needs during the planning period by 5-9 per cent.

10. In their comments, the commenters addressed separately the question of loading criteria for record services, IMTS by new entrants and

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[6] Comsat filed its first-round comments on September 17, 1984, and included therewith, a motion to accept them one business day late. Comsat cited as the reason for its lateness a breakdown in its word-processing equipment. Comsat also sought late acceptance of its November 2, 1984, Final Comments on the grounds that it needed to obtain the review of senior management officials who were absent. Inasmuch as no one was unduly inconvenienced by the slight delays, we shall grant both Comsat's motions.

[7] MCI International, INC. (MCI) filed forecast and circuit distribution data but no comments.

[8] ARINC is a not-for-profit joint venture of the U.S. airline industry which serves the communications needs of its member airlines. ARINC is not a carrier, but an unregulated user group.

IMTS by AT&T. In brief, they generally favor exemption from loading guidelines for suppliers of record services and suppliers of IMTS other than AT&T. They also generally favor some form of increased flexibility for AT&T — although none favors the immediate elimination of all restrictions on AT&T. Even AT&T, who argues that the market is ripe for reducing restrictions upon it, does not advocate immediate exemption from all restrictions. Rather, it argues for gradually increasing its flexibility over a number of years as competition develops in the marketplace. Only Comsat argues in favor of retaining the current balanced-loading methodology indefinitely, although GTE Sprint favors its retention until the introduction of TAT-8 in 1988. Even Comsat, however, has agreed that some relaxation of balanced loading could be implemented without unduly harming the public interest. In the presentation which follows we will address separately the respondents' arguments for record service, IMTS provided by new entrants and IMTS provided by AT&T.

11. *Record Services.* All of those filing comments either argue that we should continue to exempt record services from any loading requirements or do not oppose such an exemption. The carriers observe that the record-services market is relatively small[9] and that they are therefore unlikely to affect the efficiency of North Atlantic facilities. Moreover, the commenters argue that there are now several providers of such services and that record-circuit loading is subject to market forces. They also state that constraints could inhibit the further development of competition. More importantly, the carriers state that the vast majority of record-service circuits (approximately 85 percent) are used for leased-channel service where customers tend to have requirements for a cable or a satellite circuit and that the public interest would be served by giving record carriers flexibility to respond to these customer needs.[10] Comsat did not oppose exemption of record services from binding restrictions.

12. *New Entrants.* Most of those filing comments also advocate extending the exemption from loading restrictions to new entrants into

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[9] Record services as a whole account for less than 11 per cent of circuits in use in the North Atlantic.

[10] For example, the type of data processing equipment a user employs may dictate its choice of facility. Briefly, some older data-processing equipment relies for error detection upon retransmission from the receiving computer to the sending computer. In such equipment, the delay of satellite transmission requires the sending computer to pause, waiting for retransmission, and reduces the amount of processing that can be accomplished in a given time (the so-called "throughout"). Such a user would ordinarily opt for a cable circuit. Newer data-processing equipment incorporates error-correction devices to accommodate satellite delay. Further, high-speed data transmission, which requires greater bandwidth than that of voice-grade circuits, now depends upon satellite circuits which can be more easily and efficiently configured for such broad-band circuits than can cable circuits.

the IMTS market and to existing IMTS providers other than AT&T. The advocates of such an exemption argue that new entrants and existing IMTS providers other than AT&T now provide a very small percentage of IMTS and that their share of the market is expected to grow slowly over the 1986–1991 period. As a result, they argue that such new entities will have a relatively insignificant effect on the loading of overall facilities. Further, some of those filing comments argue that having maximum flexibility in routing traffic over cable or satellite facilities will aid new entrants in obtaining operating agreements from potential correspondents. The commenters also assert that flexibility in routing traffic will result in the most economical provision of service. GTE Service Corporation (on behalf of its affiliate the Hawaiian Telephone Company) states that established, but small, providers of IMTS also need such flexibility. GTE notes that its affiliate has few circuits to Europe and that it can save money by being able to route its circuits over the lowest-cost facilities. GTE also argues that routing flexibility will allow it to realize the benefits of digital transmission technology: by aggregating all its traffic on one digital facility it would have enough circuits to make use of digital circuit-multiplication equipment. Again, neither AT&T nor Comsat opposed exemption of new and existing providers of IMTS other than AT&T from loading criteria.

13. *AT&T Loading*. The commenters, however, do not support relieving AT&T of loading restrictions for IMTS. Although all parties recognize that our long-range goal is to remove ourselves from the loading question and to rely upon competitive market forces for such decisions, they argue that conditions are not now ripe for such a move. They believe that freeing AT&T too soon would be counterproductive in that it would stifle, rather than spur, the growth of a competitive market. The respondents state that AT&T, unlike other providers of international service, has overwhelming market power — AT&T accounts for over 99 per cent of total IMTS service in the North Atlantic and 89 per cent of total circuits in use in that region. ARINC characterizes AT&T's market power as "monolithic' and argues that the only way we will ever be able to remove ourselves from loading decisions will be to provide users with true alternatives to AT&T's monopoly services. ARINC asserts that the only way this can be guaranteed is to allow users to lease satellite circuits directly from Comsat (*Authorized User II*[11]) and to purchase indefeasible rights of user (IRUs) in cable circuits. Until such choices exist, ARINC argues, removal

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[11] Proposed Modification of the Commission's Authorized User Policy Concerning Access to the International Satellite Services of the Communications Satellite Corporation, FCC 84-633, 100 FCC 2d 177, 50 F.R. 2552 (January 17, 1985) (Second Report and Order). *See also* 90 FCC 2d 1394 (1982) (Report and Order), *vacated and remanded sub nom.* ITTWC v. FCC, 725 F. 2d 732 (D.C. Cir. 1984).

of loading restrictions will simply stifle competition.[12] ITTWC notes that AT&T's market power is so strong that freeing AT&T of restrictions would raise an unacceptable risk of anticompetitive abuses. GTE Sprint and SBS are particularly concerned that AT&T could immediately use up remaining idle circuits in the TAT-6 and TAT-7 cables, thereby depriving new entrants of access to cable circuits until the introduction of TAT-8 in 1988.[13] They argue that such an occurrence would severely impair the ability of new entrants to establish themselves in the market.

14. In response to the last issue, AT&T counters that the concerns relating to the availability of cable circuits are unfounded. First, it notes that the Commission has retained jurisdiction to reallocate circuits in TAT-7 and TAT-8 cables as required by the public interest. Second, it points out that the decisions authorizing the U.S. carriers to participate in the construction of these cables were conditioned on circuits being made available to new entrants. AT&T notes that, in connection with TAT-7, AT&T itself stated that it would make circuits available to any other U.S. international carrier if cable circuits were not generally available to meet the needs of those carriers. AT&T states that none of these parties has provided any foundation for the belief that AT&T would not reasonably make indefeasible right of user interests in cable circuits available to new entrants.

15. Comsat emphasizes that AT&T's preference for cable facilities, which it notes arises both from its substantial investment in such facilities and its position as a manufacturer of cable systems, distorts AT&T's loading decisions. As a result, Comsat argues that Commission withdrawal would merely place loading decisions in the hands of AT&T, not the market. Finally, Comsat argues that AT&T could, absent a loading

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[12] ARINC devotes the balance of its pleadings to its request for a change in the basis on which international cable facilities are now owned. U.S. entities and foreign correspondents own undivided half interests in circuits. ARINC requests us to change cable ownership to an arrangement where U.S. entities and their correspondents would each separately purchase their own whole circuits (the whole-circuit policy). We note that ARINC first raised its whole circuit-ownership argument in connection with our consideration of the U.S. carriers' application for authorization to construct the TAT-8 cable. File No. I-T-C-84-072. ARINC requested us to condition our grant of authority upon the carriers' agreeing to modify the TAT-8 agreement to require whole-circuit ownership. We denied ARINC's request as having been presented too late in the TAT-8 matter and suggested that it might better pursue the question in the facilities-planning process, particularly the North Atlantic Consultative Process. *See* FCC 84-240 a para. 51, note 21. 98 FCC 2d 440. ARINC argues, however, that we should address the question in the instant proceeding.

[13] SBS notes that it particularly needs to be assured of access to international cable circuits, since it distributes its traffic domestically via satellite. SBS notes that "double hops" (that is using two satellite links in tandem for the same transmission) are technically undesirable.

requirement, severely impair the satellite medium by routing all or virtually all its traffic over cable. The licensing of TAT-8, Comsat argues, enhances AT&T's existing dominance, by increasing its ability to divert future traffic to cable facilities. With respect to its entry as a competitor of AT&T, Comsat argues that it will take time for it to make inroads upon AT&T's currently "overwhelming" market power and that it is therefore unclear how soon, if ever, it would be able to divert enough IMTS traffic from AT&T to support the satellite system on its own.

16. The commenters, however, do not agree on what kind of loading restrictions should be applied to AT&T. Comsat argues that we should continue to impose balanced loading for the forseeable future. The other commenters[14] agree that we should move away from balanced loading (at least after introduction of TAT-8) in favor of increased flexibility for AT&T.[15] Most argue that balanced loading is too rigid, does not take into consideration any cost differences between facilities, and, thus, will not maximize economy or efficiency. They also argue that balanced loading, by guaranteeing a fixed share of traffic to satellite facilities, will not give Comsat an incentive to enter the retail-service market and to build its own customer base. This is a problem, they argue, because such a guarantee will not encourage intermodal competition and will, thus, not require the owners of either type of facility to reduce costs or improve the quality of their respective facilities. Rather, these parties favor the development of an alternative loading methodology, splitting generally between those calling for cost-based loading and those which would gradually increase the percentage of circuits AT&T each year could place on cable facilities. In all, there were essentially six proposed methodologies which will be described below. These are the AT&T, the Comsat, the GTE Sprint, the ITTWC, the NTIA and the joint AT&T/Comsat compromise approaches.

AT&T Proposal

17. AT&T proposes what it describes as a gradual change or "phase-in" of increased loading flexibility over a four-year period (1986-89). At the end of this four-year period AT&T proposes that we withdraw and leave it with total flexibility in loading satellite and cable facilities. During the four-year phase-in (or phase-out) period, AT&T proposes to move from a 52 per cent satellite/48 per cent cable use ratio which will obtain at year end 1985 under balanced loading to a ratio of 40 per cent satellite /60 per

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[14] TRT and GTE Service Corporation did not address the question of AT&T loading.

[15] SBS states that it might be "advisable" to give AT&T greater flexibility, and states that it favors a gradual relaxing of loading restrictions on AT&T, but does not define any particular plan by which this might be accomplished.

cent cable by year-end 1989.[16] AT&T, thus, seeks an increase of three per cent per year for four years in the flexibility to load cable facilities, although it does not guarantee that it will exercise that flexibility. AT&T also states that its proposal for a three-per-cent limit should apply to the North Atlantic region as a whole and that no specific country-by-country loading requirement would be imposed. (*i.e.*, although it would have a three-per-cent regional cap it would have total flexibility in negotiating country-by-country loading plans).

18. AT&T argues that its approach would increase reliance on marketplace forces and represents a more economic use of cable and satellite facilities than does balance loading. It would, notes AT&T, also encourage Comsat to enter the competitive market to develop its own customer base. AT&T also states that its plan would allow us to continue to monitor its loading decisions to assure compliance with its commitments. Finally, AT&T assures us that its plan will not adversely affect service quality or reliability, and that service reliability will be "comparable" to that now achieved under balanced loading.[17]

19. AT&T emphasizes that allowing it the requested greater freedom will not threaten the INTELSAT satellite system. AT&T notes that its foreign correspondents have a substantial economic and political investment in INTELSAT and are not interested in jeopardizing those commitments. Additionally, AT&T states that it does not anticipate a wholesale abandonment of satellite facilities; that its plan is a gradual "phase in" over a four-year period. Finally, AT&T states that its plan applies only to growth traffic and that it will not deload any satellite or cable facility.

20. *Comsat Proposal.* Comsat argues that any loading methodology we adopt should achieve four objectives. First, such a methodology should provide a framework which encourages intermodal competition. Second, it should be flexible enough to accommodate deviations (shortfalls or overages) from forecasted traffic levels as well as the requirements of new entrants. Third, it should facilitate the planning of international facilities. Fourth, it should lessen the Commission's regulatory involvement. Comsat believes that the loading mechanism which best meets these

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[16] While AT&T's proposal is for loading ratio of 40/60 for either facility, it is clear that what it really seeks is the ability to use more cable circuits. Under its proposal, AT&T would increase its cable use from 48 per cent to 51 per cent in 1986, to 54 per cent in 1987, to 57 per cent in 1988 and to 60 per cent in 1989. At the end of the four-year period, AT&T filings indicate that it would increase its cable usage to 66 per cent in 1990 and 71 percent in 1991.

[17] AT&T acknowledges that, because its methodology would place more circuits on cable, a failure of a cable would interrupt more circuits than would be the case under balanced loading and that service reliability would be adversely affected. However, AT&T argues that improved networking techniques (restoration and network management) will reduce the impact of service interruptions.

criteria is balanced loading. Comsat argues that balanced loading assures efficient use of existing cable and satellite facilities, minimizes the effects of the failure of a facility, is easily understood by all parties, can be implemented relatively automatically, and will automatically accommodate traffic fluctuations and new entrants. As a result, Comsat argues that use of balanced loading will minimize Commission involvement in the question of loading. Comsat also asserts that, by assuring that traffic is directed to both cable and satellite facilities, balanced loading will give all parties a firm basis on which they can base their facilities plans —since it believes that facilities owners cannot plan facilities or their timing unless they know how they will be used.

21. *GTE Sprint Proposal.* GTE Sprint also supports a transitional approach which would gradually allow AT&T more loading flexibility. GTE Sprint, however, notes that, due to the lead time needed to design and construct new cable and satellite facilities, no benefit would result from freeing AT&T from balanced loading until the TAT-8 cable is introduced in 1988. From 1988 until 1992, when GTE Sprint states that TAT-9 cable is scheduled to be introduced, its plan would allow AT&T the flexibility to place between 45 to 55 per cent on either cable or satellite. From 1992 to 1994, the GTE Sprint plan would allow AT&T to place 35 to 65 per cent of circuits on either cable or satellite facilities. Beyond 1994, GTE Sprint would free AT&T from loading requirements, but states that we must nonetheless continue to monitor facilities loading to protect against efforts of overseas telecommunications entities to dictate facility options to U.S. entities if such dictation were contrary to U.S. interests.

22. *ITTWC Proposal.* ITTWC advocates a transitional approach which would permit AT&T over the period 1986-1991 to move away from balanced loading at a rate of two per cent per year (at that rate AT&T would reach its proposed 60/40 ratio in six years).[18] Even After 1991, ITTWC does not recommend freeing AT&T from all loading restrictions. Rather, it would require AT&T to submit distribution plans in which the levels of cable and satellite use are determined by "the cost of available and proposed facilities" in which the lower-cost facility would receive proportionately larger levels of traffic. ITTWC states that its proposed cost-based loading mechanism should apply only to growth traffic (that is, AT&T should not deload any facilities) to avoid disruption of existing investments. ITTWC believes its methodology would increase intermodal

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[18] During the 1986-1991 period, ITTWC advocated actually the continuation of what it called an "equitable loading methodology." In its September 14 comments ITTWC did not define what it meant by the term "equitable," but in its November 2 Final Comments, it stated that it did not mean thereby balanced loading and stated that it believed allowing AT&T to increase cable use by up to two per cent per year would be "equitable."

competition and lower facilities costs (the only way for a cable or satellite owner to increase its traffic would be to lower the relative cost of its facility) and could lead to the ultimate withdrawal of the Commission from loading decisions. ITTWC recognizes that its approach, like that of NTIA, requires the gathering of cost information not now available, but notes that the 1986-1991 period could and should be used to gather that information.

23. *NTIA Proposal.* NTIA identifies four options for an alternative loading methodology.[19] The first would be to base cable and satellite loading on their respective revenue requirements. The second option is what NTIA describes as a "transition" to option 1 in which, recognizing that the information necessary to calculate a *regional* revenue requirement for satellite facilities is not now available, would use Comsat's tariff lease charges as a short-term substitute for the satellite revenue requirement. The third option would be to allow customers to decide, for all services, including IMTS, the type of facility to be used. The fourth option is what NTIA calls a *laissez faire* approach which is essentially identical to our option of immediate withdrawal from loading decisions.

24. NTIA asserts that Options 3 and 4 (customer choice and *laissez faire*) are not now workable and recommends Option 2 (the transitional approach) which will lead ultimately to Option 1, which it views as the best solution. NTIA argues that Commission withdrawal from loading decisions is not feasible, since the international market is not truly competitive, and that, without such a competitive market, the potential for anticompetitive abuses is too great. With respect to relying upon customer choice, option three, it states that this might also be a good long-term goal, but concedes that it cannot now be implemented since the international dialing system does not permit IMTS customers to select the type of transoceanic facility.[20]

25. NTIA states that Options 1 and 2 should be viewed together, as Option 2 is merely a transitional step toward Option 1, and that they represent the best and most workable approach to achieve our overall goal of the least-cost mix of facilities and least amount of governmental involvement in facilities-loading decisions, while preserving our ability to

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[19] NTIA first raised its proposed methodology in comments filed in the Pacific Planning Process (CC Docket No. 81-343), but raises them again in its comments in this proceeding. NTIA specifically incorporates its prior pleading by reference. The description of the NTIA proposal which follows is from its Pacific Planning Comments.

[20] NTIA notes that there are a number of technological, institutional, and economic problems, many of which have not yet been identified, which must be solved before customers could be permitted to choose their own routing. For example, NTIA notes that in the case of IMTS service these problems include planning, switching, accounting and coordination. NTIA also notes that the necessity to obtain the agreement of overseas PTTs could raise political problems.

protect the public interest. The NTIA plan would base loading upon the relative revenue requirements of cable and satellite facilities. That is, NTIA would require the cable and satellite owners to submit the per-circuit revenue requirement of their respective mediums. From these, we would calculate a "composite" facilities revenue requirement for the region. The medium with the lower per-circuit revenue requirement would receive a share of circuits inversely proportional to the relation of its revenue requirement to the average revenue requirement for both mediums. That is, the facility with the lower revenue requirement would receive a proportionately larger share of traffic.

26. NTIA explained the operation of its methodology through a hypothetical example: NTIA assumed that the per-circuit revenue requirement for cable is $9,000 and the satellite revenue requirement (lease charge) is $6,000. The composite would be $15,000 ($9000 + $6000). The ratio of the cable revenue requirement to the composite would be .60 [$9000/$15000] and the satellite ratio would be .40 [$6000/$15000]. Using an inverse ratio, the satellite (the cheaper facility under this hypothetical) would receive 60 per cent of the traffic.[21] So as to "normalize" facilities and not "give an apparent advantage to either medium," NTIA would base the initial revenue-requirement calculation upon an assumption that traffic in each region is divided equally between cable and satellite facilities.[22] Recognizing that the cost information needed to calculate a revenue requirement for specific satellite configurations on a regional basis is not now available, NTIA would employ Comsat's bundled monthly lease charges (now $1060 per voice-grade circuit) as a surrogate.[23]

27. NTIA state that the benefit of its methodology is that it would put the cable and satellite mediums into competition, since the only way for a cable owner or for Comsat to increase its share of traffic would be for it to lower the revenue requirement of its facilities. His, in turn, would require such an owner to lower rates for end-user service, introduce innovative pricing policies, introduce new services, keep a tighter rein on variable

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[21] NTIA also recognizes that foreign correspondents may not agree to the loading percentages thus derived. However, since proportions would represent the optimal levels for U.S. interests, NTIA argues that the U.S. carriers could use the calculated usage levels as the starting point in negotiating a mutually-acceptable level.

[22] NTIA notes that, since the cost effectiveness of either medium increases with use, if one facility receives more traffic over a substantial period, its cost per circuit would go down relative to the other facility which was not so heavily used. To avoid imbalances in use caused by carrier choice, balanced loading, or other past practices, and the attendant distortion of cost figures, NTIA would ignore actual, past use levels at the inception of its loading mechanism.

[23] On February 1, 1985, Comsat, pursuant to the requirement in our *Earth Station Ownership* rulemaking, FCC 84-605, 49 F.R. 50030 (December 26, 1984), filed revisions to its tariff to unbundle its tariff charges into separate charges for space segment and earth-station services.

costs (such as operating and maintenance costs), retire inefficient facilities, use cable facilities to restore satellite facilities instead of having a spare satellite and use satellite to restore cable instead of having excess cable capacity, and use more circuit-multiplication equipment such as TASI and TDMA/DSI. The net effects of these measures, according to NTIA, will be a more efficient use of facilities and lower prices for end users. NTIA notes that its methodology would also shift the risk of facilities investment from users to the shareholders of the carriers.[24]

28. NTIA recognizes that its plan need further exploration and refinement before it could be implemented. One problem area NTIA identifies is the fact that Comsat's lease charges are not a perfect substitute for the satellite medium's regional revenue requirement. NTIA notes that INTELSAT's costs are averaged worldwide and that Comsat's rates are averaged for the regions (Atlantic and Pacific) that it serves. Further, NTIA notes that, since conditions vary from ocean basin to ocean basin the fully-allocated costs for a particular region may be either above or below INTELSAT's average costs. Still, NTIA notes that these figures are available and can serve as a close, if not perfect, approximation of the regional revenue requirement. NTIA further notes that the INTELSAT costs are only part of Comsat's total costs and argues that any skewing effect of INTELSAT's worldwide cost averaging should be relatively minor. NTIA also recognizes that cable revenue-requirement figures are not now available either and that there may be some dispute as to what elements should be included in their calculation. NTIA, however, believes these issues are manageable. Even though its plan may require substantial Commission involvement in calculating the revenue requirements, NTIA alleges that it will reduce Commission effort in facilities planning and licensing and, after implementation, will largely be self-executing.[25]

C. AT&T/Comsat Joint Proposal

29. The issue of loading mechanisms has also been under examination in the North Atlantic Consultative Process. In a joint submission to a meeting of the North Atlantic Consultative Working group in Orlando, Florida, January 8-11, 1985, AT&T and Comsat submitted a "coordinated

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[24] NTIA's approach would also call for us to shift our regulatory review away from the facilities-authorization stage. That is, the NTIA plan calls us to approve requests by the carriers and Comsat to build any facilities they want, but to make clear to them that the use of the facilities would be determined objectively by relative costs. As a result, NTIA argues, the facilities owners would be required to keep costs low and to avoid excess capacity, since excess facilities would increase their costs and reduce the number of circuits they could use.

[25] NTIA proposes that the carriers be allowed to apply for blanket authorization of all the cable and satellite facilities they will need in a given period which would automatically be granted unless we rejected it within a specified time.

plan" which the authors state would "allow a greater degree of flexibility than is present in the current [*i.e.*, balanced-loading] plan while preserving the advantages of a coordinated plan." United States Submission to NACWG, at p. 30. The proposed plan represents a version of the proposal AT&T had submitted in its comments: to allow beginning in 1986 a gradual increase each year in cable/satellite loading flexibility up to a maximum of 60 per cent on either cable or satellite. The joint proposal, however, does not specify the number of years in the "phase-in" period (AT&T had proposed four years) or the percentage of change to be allowed each year (AT&T had proposed 3 per cent per year). These issues were left to future negotiation.

30. Like the AT&T plan, the joint proposal would allow the loading plans for individual countries to differ from the agreed upon percentages, so long as the regional total for the North Atlantic remains within the agreed ceilings each year. The proponents note that this approach would grant service carriers greater flexibility, while giving "due regard to such considerations as the level of existing INTELSAT investments, the need to preserve adequate restoration alternatives, and the economics and preferences of individual carriers and correspondents." *Id.*, at 31. The proponents also state that it is difficult to predict how the market will develop into the 1990's and therefore suggest that the proposed plan apply "for some interim period," with all parties continuing to monitor cable/satellite loading and to exchange views concerning policies for the future.

D. CEPT View

31. Also at the January, 1985, North Atlantic Consultative Working Group meeting, the representatives of the CEPT entities expressed their view that distribution decisions in the North Atlantic region should be left solely to the telecommunications entities which have invested in the cable and satellite facilities used to provide service. The CEPT entities oppose the use of any rigid distribution formulas and support a flexible circuit-distribution methodology based entirely upon bilateral discussions between correspondent pairs. In the CEPT's view any circuit-distribution methodology adopted should:

1. Recognize that satellites and cables are complementary transmission mediums and, thus, allow for an overall network optimization;
2. Take into account the need for media and path diversity;
3. Recognize the different characteristics of different mediums and the impact this may have on planning;
4. Allow activation of capacities so as to make the best economic use of committed investments;
5. Not include any rigid formulas which would impede flexible planning; and

6. Leave sufficient freedom for bilateral discussions between individual traffic partners.

32. The CEPT representatives stated that they view the joint proposal of AT&T and Comsat as a move in the right direction and that it could serve as a basis for further discussion when further information became available as to the size of the increase in flexibility to be allowed each year and the period over which the proposal would extend. The CEPT entities questioned the imposition of a 60-per-cent limitation on the loading of a given medium. The CEPT representatives also stated their view that the NTIA proposal does not provide the required degree of flexibility and is, therefore, unacceptable to them as a circuit-distribution methodology.

II. Discussion

33. Our goal is to rely on market forces to establish the optimal mix of services, rates and facilities. We believe that a competitive environment best balances the need for high-quality service, diverse routes and sufficient capacity with the desire to minimize rates for users. We further believe that market forces can be used to encourage the efficient use of existing facilities and the development and deployment of the most efficient facilities in the future. After reviewing the comments and information filed in this proceeding, we agree with those filing comments that the market is not now sufficiently competitive to allow us immediately to remove ourselves from circuit distribution decisions with respect to AT&T's international MTS circuits. We also agree with most parties that balanced loading, although providing certain service-reliability benefits, is too rigid a methodology, does not promote intermodal competition, and will not significantly move us toward a greater reliance on market forces.

34. We are entering a transitional period during which carrier and facility competition will develop. In such an environment, it is necessary to fashion a new methodology which will permit AT&T more flexibility than allowed under the current balanced-loading methodology. However, this flexibility should reflect the nascent state of competition while at the same time encourage Comsat and other service providers to compete vigorously. As a result, we tentatively conclude that we should adopt a transitional loading mechanism which will allow AT&T over the next six years to increase by two per cent per year the number of circuits it places on either cable or satellite facilities from the 52 per cent satellite and 48 per cent cable level which will obtain at year-end 1985 up to a maximum of 60 per cent on either medium. During this transitional period, Comsat and other providers will have an opportunity to increase their shares of the international MTS market. We do not, however, see any need to impose circuit-distribution restrictions upon providers of record services, upon new entrants into the international record or MTS markets, or upon providers of IMTS other that AT&T. Such services account for a relatively

small number of circuits as compared with IMTS and thus will not significantly affect the efficiency of overall facilities use. As a result, we tentatively conclude to continue to exempt circuits used by these carriers from facilities-use requirements. In the discussion which follows we shall first consider the three broad methodologies we outlined in our Notice: balanced loading, immediate elimination of guidelines for AT&T and non-imposition of guidelines for other carriers, and phase-in alternatives. We shall then discuss under the alternative phase-in approach the various proposals presented by the parties for AT&T's IMTS circuits. We shall also describe a staff proposal which ties flexibility for AT&T to increased market entry for other providers of IMTS. Finally, we shall consider an ancillary issue raised by one of the parties outside the issues designated in our Third Notice of Inquiry.

A. Balanced Loading

35. Based upon our analysis of balanced loading and its effect upon our overall policy goals, we have tentatively concluded that we should no longer base circuit use upon that methodology. We do not mean by this that we no longer see benefits in the balanced-loading methodology. It continues to provide the service quality benefits we have previously detailed: it helps service reliability by reducing to a minimum the number of circuits interrupted by the failure of a major transmission facility. It also provides a predictable and automatic technique by which to handle sharp deviations of actual demand from forecasted traffic levels. As indicated by the table appended to this Second Notice of Proposed Rulemaking, the percentage of circuits placed on satellites resulting from application of balanced loading during the 1986-1991 period would range between 45.9 and 53.5 percent. The corresponding range for cable circuits would be 46.5 to 54.1 per cent. This range of percentages should not produce undue adverse effects on AT&T, Comsat, INTELSAT or new entrants. Balanced loading, however, by guaranteeing Comsat essentially one-half of all growth traffic during the 1986-1991 period, provides it with little incentive to enter the IMTS market and to compete for its own customer base. Additionally, it fails to provide Comsat, INTELSAT or AT&T with incentives to build and operate efficient, low-cost facilities. The lack of such incentives would slow the development of a marketplace mechanism for the cost-based distribution of circuits between cable and satellite. We must, therefore, tentatively conclude to reject a continuation of balanced loading.

B. Immediate Elimination of Loading Guidelines

36. As we have indicated, none of the parties to this proceeding argues for the imposition of loading requirements upon providers of record services, upon new entrants in either the record or IMTS markets, or upon

IMTS service providers other that AT&T. As discussed below, we see no reason to impose such restrictions on such a relatively small percentage of circuits, where customers frequently designate a medium, where competition appears to be developing, and where no entity has substantial market power.

37. *Record Services.* We tentatively conclude that we should continue to exempt circuits used for record services from any specific circuit-distribution guidelines. The total number of circuits in the North Atlantic used for record services is relatively small (less than 11 per cent of total circuits) and thus could have little effect on the overall use of cable and satellite facilities. Further, the vast majority (approximately 87 per cent) of total record circuits are used for leased-channel services, services for which customers often have a specific need for either a cable or a satellite circuit. Additionally, leased-channel and switched record services are offered by multiple international carriers, none of which appears to have an overwhelming market share or to wield market power, and the number of such carriers is likely to increase. Thus, we tentatively conclude that there continues to be a viable marketplace mechanism for distributing leased-channel and switched record circuits between the cable and satellite mediums and that such circuits should be exempt from any loading requirements.[26]

38. We wish to make it clear that our proposal to exempt record circuits from a specific circuit-distribution methodology would apply to any U.S. international carrier providing such services, including AT&T. At present, the major international record service AT&T provides is leased-channel service. AT&T's leased channels are subject to the same marketplace distribution mechanism as applies to other U.S. carriers. Moreover, AT&T is, in effect, a new entrant into the leased-channel market, inasmuch as we had prohibited AT&T between 1964 and 1982 from providing leased record channels.[27] AT&T does not have a significant share of the record leased-channel market. As of the end of 1984, for example, AT&T provided only 90 of the approximately 1442 leased

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[26] The effectiveness of existing market forces will be further enhanced by several recent events. First, the introduction of INTELSAT Business Service (IBS) will provide users with an additional choice of service and may increase competition in the international leased-channel market. IBS allows the location of smaller, cheaper earth-stations on or near customer premises and can save customers the cost of domestic tail circuits. Further, because we have authorized a number of entities to provide the earth-station portion of IBS, most of whom have no ownership of cable facilities, IBS may introduce price competition between cable and satellite facilities. Price competition should also be stimulated by our recent decision in *Earth Station Ownership* to allow competitive earth-station services in connection with regular INTELSAT satellite services, and our decision in *Authorized User II* to allow Comsat to provide space segment directly to users.

[27] *See* Overseas Communications (TAT-4 Revisited), 92 FCC 2d 641 (1982).

channels in service between the U.S. and the CEPT countries (6.2 per cent). Given the strength of the marketplace mechanism for allocating leased circuits between the cable and satellite mediums and AT&T's relatively small market share, we find no public-interest reason to impose greater restrictions upon AT&T's distribution of leased-channel circuits than upon that of other carriers. We thus propose also to exempt AT&T from specific distribution guidelines for leased-channel and other record services.

39. *New Entrants.* We also tentatively conclude that we should not subject new entrants into the international record or MTS service markets to any specific circuit-distribution guidelines. We note, again, that none of those filing comments opposed giving new entrants total loading flexibility. Just as we tentatively concluded that circuits used for the provision of international record services should be exempted from specific circuit-distribution guidelines, we believe the same considerations generally apply to circuits used for such services by new entrants. New providers of leased channels will be subject to the same customer-choice, marketplace mechanism for distributing such circuits between cable and satellite facilities that we discussed above. New providers of switched record services will employ relatively few circuits and be subject to competition from existing suppliers. Moreover, at least initially, the new entrants will account for only a relatively small portion of the total number of circuits in use and will, thus, have little impact upon the overall use of cable and satellite facilities.

40. New entrants into the IMTS and other international voice-services markets can be expected to use more circuits initially than those providing only record services. However, for the foreseeable future, the number of circuits used by new entrants such as GTE Sprint and MCI will be considerably smaller than the number of circuits AT&T will use for such services. Again, exempting circuits used by new entrants for international MTS is likely to have only a small impact upon the relative use of the cable and satellite mediums and provide these entities with additional economic and technical flexibility to assist them in gaining entry.[28] Similarly, established IMTS providers other than AT&T, such as Hawaiian Telephone, should also be exempt from loading guidelines since they employ few circuits and would benefit from maximum flexibility.

41. *IMTS by AT&T.* No party argues for the immediate elimination of circuit-distribution guidelines for AT&T's provision of IMTS. The problem with such a course, as they view it, is that AT&T has too much market power in the IMTS market and that market forces will not assure that facilities-use decisions will be based on cost. We agree with the parties to

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[28] This technical flexibility should satisfy SBS's concern with double satellite hops. *See* note 12, *supra*.

this proceeding that the international MTS market is not now competitive, that certain biases exist, and that AT&T has significant market power. To illustrate the parties' concern, at year-end 1984, out of a total of approximately 14,617 voice circuits in use between the U.S. and the CEPT countries for the provision of all international services,[29] approximately 12,965 (88.7 per cent) were used for IMTS. Of these, approximately 12,944 (99.8 per cent) were used by AT&T.[30] International MTS users do not have the ability to select whether their calls will be placed on cable or satellite facilities; that decision is made by AT&T. As a result, in large measure, the distribution of AT&T's IMTS circuits determines the relative use of cable and satellite facilities. AT&T downplays its market power and takes exception to any idea that it would engage in anticompetitive conduct, but even AT&T does not argue for us to remove ourselves from the circuit-distribution question. AT&T, rather, recognizes Comsat's dependency on it for traffic and acknowledges a need for continued Commission oversight for a transitional period, but argues for flexibility which will encourage Comsat to become more competitive.

42. While the introduction of competition into the provision of IMTS can be expected to aid in the development of a marketplace mechanism for determining cost-based circuit distribution, it is unlikely that such a mechanism will be adequately developed by the end of 1985. Moreover, because of delays occasioned by the court stay and remand of our *Authorized User II* policy, Comsat was only afforded the opportunity to offer IMTS and other end-to-end services directly to users in January of this year. Thus, the entity with the strongest incentive to promote the use of satellite circuits as a counter to AT&T's preference for use of cable circuits has not yet been able to enter the IMTS and other end-to-end services markets. These factors lead us tentatively to conclude that the immediate elimination of loading guidelines would not serve the public interest. We do not mean by this that our withdrawal depends only on Comsat's ability to penetrate the IMTS market as a service or facility provider. If this was our only criterion, Comsat would have an incentive not to enter that market or to lower its charges for circuits employed by other carriers for IMTS. It is, however, our intention to give Comsat an adequate opportunity to enter various end-to-end service markets and to

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[29] There may be minor errors in the calculation of the total number of voice circuits used for all U.S.-CEPT services at the end of 1984. These data are derived from the monthly circuit reports and a number of the international record carriers are late in filing their reports for December 1984. Thus it was necessary to use the reports for earlier months of 1984 for those carriers.

[30] At the end of 1984 HTC operated 21 voice circuits for the provision of IMTS between Hawaii and the United Kingdom and Germany. In addition, MCII has been authorized to lease 24 satellite circuits for the provision of IMTS between the United States and Belgium.

make all its operations more efficient. The corollary to this tentative conclusion is that there is a need for us to develop guidelines for the distribution of circuits used by AT&T for the provision of IMTS in the North Atlantic region for a transitional period until an effective marketplace for distributing circuits between the cable and satellite mediums develops.

C. Alternative Proposals

43. The major issue in this proceeding is what methodology should be established to govern AT&T's loading of its IMTS traffic. All of the commenters addressed this point in depth. Having rejected both a continuation of balanced loading and an immediate withdrawal of guidelines for AT&T circuitry employed for IMTS, we now turn to the various proposals submitted by NTIA and the carriers. We believe that an alternative methodology can be fashioned which spurs intermodal competition, while recognizing AT&T's dominant position in the international marketplace.

44. In response to our Notice the respondents suggested four phase-in methodologies. AT&T proposes a four-year phase-in which would allow it to increase, on a regional basis, cable use by three per cent per year. On the other hand, GTE Sprint argues for a much slower transition. GTE would allow no increase in cable use over balanced loading until the TAT-8 cable is introduced in 1988. Over the following four years until 1992 (the possible introduction date of TAT-9), GTE would allow AT&T to increase cable loading up to 55 per cent. From 1992 to 1994 a further 5 per cent per year to 65 per cent when GTE would free AT&T entirely. ITTWC proposes that AT&T be allowed to increase cable loading at two per cent per year over six years to 1991. After 1991 ITTWC advocates a relative-cost loading methodology which appears to be similar to the NTIA methodology (although not at all spelled out at this stage). Finally, the joint proposal of AT&T and Comsat also suggests a transition to a 60/40 cable/satellite ratio, but does not specify the length of the transitional period or the degree of flexibility to be allowed AT&T each year. Rather, it leaves these questions to future negotiation.

45. Our analysis of the various proposals before us causes us tentatively to conclude that we should adopt a phase-in approach which would permit AT&T a moderate annual increase in the number of circuits it can place on either cable or satellite facilities for international MTS between the U.S. and CEPT up to a maximum of 60 per cent of such circuits on either medium. More specifically, we propose to permit, but not require, AT&T to increase the number of IMTS growth circuits it places on satellite or cable facilities up to two per cent per year for six years, without deloading any facility, until it reaches a maximum of 60 per cent of all U.S.-CEPT IMTS circuits on either medium. As we have stated,

AT&T projects that, at the end of 1985, balanced loading will place 52 per cent of AT&T's international MTS circuits on satellite and 48 per cent on cable facilities. If AT&T were to increase its cable loading at a rate of two per cent per year, it would reach the 60 per cent maximum for cable in six years — or by year-end 1991. We believe that this proposal, not dissimilar to the one presented by ITTWC, will provide all entities the proper incentive to become more efficient and to compete vigorously for customers, while protecting the investment of cable and satellite owners against too-rapid change.[31] We also agree with the consensus of the parties that the relative use levels of 60 per cent/40 per cent on either cable or satellite medium represents a useful and beneficial standard for the 1986-1991 period.[32]

46. In opting for a phase-in proposal, we emphasize that we are not necessarily rejecting the NTIA proposal to simulate the market. NTIA's proposal does have some appeal but remains at this time too undefined. As NTIA acknowledges, the costing process is not simple and the variables are many. Further, we note CEPT's generally negative response to this proposal and a need to implement a new methodology in a short period of time. We discuss the various alternative proposals below, including a staff proposal.

47. *NTIA Proposal.* The NTIA proposal to base circuit distribution upon the relative cost of cable and satellite circuit has a number of advantages. Its use could, through regulatory actions, encourage the development of marketplace forces and lead to the least-cost mix of cable and satellite circuits. It could also encourage the development of an unbiased market for cable and satellite circuits. As NTIA recognizes, its proposal can be modified to accommodate other considerations, such as the differing loading preferences of the carriers' foreign correspondents.

48. However, NTIA also recognizes that its proposal is not yet fully defined. There is no universally accepted mechanism for determining the per-circuit revenue requirement for either the cable or satellite medium. Further, as NTIA notes, determination of per-circuit revenue requirements for satellite circuits on a regional basis is a complex task because, among other things, the revenue requirement will vary depending upon the cost and capacity of a given satellite design, changes in the methods used for access to the satellite, and the number and characteristics of the earth stations used with the satellite. Determination of the per-circuit

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[31] The ITTWC proposal calls for imposition in 1992 of a cost-based loading formula conceptually similar to the NTIA proposal. As we make clear elsewhere, we shall not now commit to any loading criterion in the post-1991 period, but will review that issue at a later date as competition becomes established in the market.

[32] Comsat's agreement to the joint proposal represents an apparent change from Comsat's prior insistence upon balanced loading as the only acceptable facilities-use methodology. Comsat appears to have accepted the possibility of a phased-in approach.

revenue requirements for cable circuits is also complex. Such a determination would include not only the cost of the cables themselves, but would also have to take into consideration the cost of overseas connecting circuits used to extend the cable circuits from the overseas terminals to the countries of final destination.

49. The rapid improvements in circuit-multiplication equipment and satellite-access methods we are now experiencing will further complicate the process of developing accurate determinations of per-circuit revenue requirements. The digital circuit-multiplication equipment which will be used with the TAT-8 cable is still under development, as indeed are some types of access and circuit-multiplication equipment which will be used with the INTELSAT V, V-A and VI satellites. The nature of the equipment which will actually be used has not yet been fully defined, either as to the maximum effective capacity it can be used to generate or as to its cost. Both types of information are required for an accurate calculation of the revenue requirement.

50. We do not believe these difficulties are insurmountable. The process for developing such revenue requirements on a per-circuit basis is not wholly dissimilar from the cost analyses we used in our Docket No. 18875, the earlier phases of this docket and other planning proceedings. Our experience in those proceedings, however, indicates that the determination of the per-circuit revenue requirements will require considerable effort on the part of the carriers, Comsat and the concerned governmental entities. The definition of the elements to be included in the revenue-requirement comparison as well as the methodology to be used in calculating such requirements are likely to be a source of contention among the various parties.

51. We also perceive some potential implementation problems with the NTIA proposal. The proposal appears to require substantial regulatory examination of the relative cost efficiencies of cable and satellite facilities and frequent regulatory adjustments to the circuit distributions permitted between those facilities. Our overall goal is to move as rapidly as prudent from regulatory to marketplace determination of circuit distribution. By creating a regulatory substitute for a marketplace mechanism for the cost-based distribution of circuits, the NTIA plan could delay our exit. Further, NTIA's year-by-year approach would complicate the facilities-planning efforts by Comsat, INTELSAT, AT&T and overseas administrations. Such uncertainties could create disequilibrium in facility capacity and adversely affect service quality.

52. We must, therefore, tentatively conclude that the NTIA proposal is not sufficiently defined at present to permit us to adopt it. However, we do not rule out the possibility of its use if it can be more fully defined and if the questions we identified above can be resolved. The NTIA approach

would appear to provide a strong incentive for cable and satellite owners to lower costs and could indeed yield lower user costs. Therefore, in responding to this Second Notice of Proposed Rulemaking, we request the parties to address fully the NTIA proposal. Specifically, we seek comments on the types of cost categories which should be included in developing a revenue requirement for cable and for satellite circuits as well as specific methods by which the revenue requirements should be calculated. We also request the parties to address how a transition from NTIA's proposed methodology for circuit distribution to a marketplace distribution might be accomplished. In this connection, comments should take into account such factors as how to accommodate a foreign correspondent's circuit-distribution preferences and how to account for increasing competition in the provision of international MTS. We will carefully consider this information in making our final determination in our Second Report and Order in this proceeding.

53. *Phase-Ins.* In reaching our tentative conclusion to implement a phase-in methodology, we have considered AT&T's original proposal, the proposals submitted by other carriers and alternative guidelines which would permit increases in loading flexibility at annual rates of 2, 2.5 and 3 per cent per year. All of the proposed guidelines we analyzed, other than AT&T's original proposal, imposed a 60 per-cent ceiling on the loading of either medium throughout the 1986-1991 period. Our analysis assumed that the flexibility granted by our tentative guidelines was used to increase the percentage of total circuits carried by the cable medium by the maximum allowed annual percentage. We then compared the number of circuits placed on each medium that would result from each of the four alternative guidelines with the distribution of circuits that would have resulted from the continued use of the balanced loading.[33] We then calculated the difference in the revenues Comsat and INTELSAT would receive from the numbers of circuits on satellite each year called for by each of these guidelines compared to those which Comsat would have

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[33] In performing our analyses, we utilized only the traffic forecast which AT&T submitted on August 31, 1984 and the displays of circuit distributions and other analyses that AT&T submitted based on that forecast. AT&T submitted an updated forecast on November 1, 1984, in connection with preparations for the meeting of the North Atlantic Consultative Working Group held January 8-11, 1985. However, AT&T did not update its circuit distribution and analyses to indicate the effect of the new forecast thereon. In addition, AT&T submitted its updated forecast too late to permit the other parties to revise their analyses of AT&T's distributions. Because we believe this information is needed to develop proper distribution guidelines and to allow the other parties and our staff to assess the effect of the changed forecast, we shall require AT&T to include in its comments in response to this Second Notice of Proposed Rulemaking revised circuit distributions for each year of the planning period and revised analyses based on the updated forecast.

received under balanced loading.[34] The results of this analysis are set forth in the table appended to this Second Notice of Proposed Rulemaking.

54. As may be seen from that table, the effect of AT&T's proposed guidelines would be to reduce Comsat's revenues by a total of approximately $218.2 million over the six-year period from what it would have received under balanced loading. INTELSAT would receive approximately $160.6 million less over the same period. During the six-year period (1986-91), of the 24,853 growth circuits AT&T projects that it will need for IMTS, it would under its preferred plan place 21,133 (85.0 per cent) on cable facilities and 3,720 (15.0 per cent) on satellite facilities. The majority of this traffic and revenue "diversion" would occur in 1990 and 1991, when AT&T seeks complete freedom in circuit distribution. We calculate that Comsat's revenue loss for 1990 and 1991 would be approximately $58.7 million and $102.0 million, respectively. The corresponding revenue losses for INTELSAT would be approximately $43.2 million and $75.1 million. Under AT&T's proposal, it would activate only 12 additional satellite circuits in 1990 and 15 additional satellite circuits in 1991; all other growth would be on cable facilities.

55. Under the proposed guidelines allowing an annual two percent increase in loading flexibility over the six year period, Comsat and INTELSAT would receive approximately $90.1 and $66.3 million less, respectively, than they would have received under balanced loading. Of the 24,853 growth circuits AT&T projects during that period, AT&T would place 16,691 (67.2 per cent) on cable and 8,162 (32.8 per cent) on satellites. Continuation of balanced loading would require AT&T to place 13,115 circuits (52.8 per cent) on cables and 11,738 (47.2 per cent) on satellite facilities. The revenue and circuit-use figures for the guidelines allowing increased loading flexibility at rates of 2.5 and 3 per cent per year fall between the figures calculated for the 2 per cent annual increase and those calculated for AT&T's proposed guidelines. The table appended to this document shows the specific figures.

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[34] Our revenue calculations are based on the assumption that Comsat's existing tariff rate of $1060 per month for voice circuits remains in effect throughout the 1986-1991 period. Changes in this assumption, such as AT&T's providing its own earth stations, or variations in Comsat's tariff, would alter the results or our analysis. Our calculation of INTELSAT revenues is based upon the assumption that the current INTELSAT unit charge of $390 per voice-grade circuit per month remains in effect throughout the 1986-1991 period. It should be noted that INTELSAT's unit charge for voice circuits provided by means of TDMA/DSI will be 12.5 per cent lower than the current $390 unit charge. Since some of AT&T's circuits may be provided by use of TDMA/DSI, our calculations of the differences in INTELSAT's revenues may be larger than that which will actually occur. Similarly, assuming Comsat's tariff rate reflects the 12.5 per cent lower INTELSAT unit charge for TDMA/DSI circuits, the differences in revenues we calculated for Comsat may also be higher than those which will actually occur.

56. From the foregoing, we tentatively find that AT&T's proposed guidelines, if implemented as proposed by AT&T, are not likely to afford a transition period of sufficient length to offset existing biases or to permit development of a marketplace mechanism for distribution of IMTS circuits. While competing carriers are now entering the U.S.-CEPT IMTS market, they are unlikely to make substantial inroads into AT&T's market dominance in the four-year period envisioned by AT&T's proposed guidelines. Moreover, Comsat, the entity with the greatest incentive to use satellite circuits for the provision of international MTS, has only been free to enter that market since January, 1985. We believe that the public interest will not be served by attempted reliance upon market mechanisms until the market has become competitive. That is not likely to be the case by year-end 1989.

57. We are also concerned with the comparatively small percentage (15.0 per cent) of growth circuits AT&T's proposal would place on already procured or planned satellite facilities during the 1986-1991 period. Such comparatively low levels of use could exert undue upward pressure on Comsat's and INTELSAT's per-circuit costs, and hence Comsat's rates for satellite circuits, and thus inhibit the development of intermodal competition. The cable and satellite facilities which will be used to provide service in the North Atlantic region during this period are either already in service or are under construction pursuant to binding procurement contracts. As a result, both INTELSAT's and other cable owners' capital costs for their respective facilities which will be used during this period are, for the most part, sunk.[35] Because this is so, owners will be forced to recover their total revenue requirements from the revenues generated by the number of circuits in each medium which are actually used to provide service. Consequently, activating more circuits in a given medium will have the effect of reducing the actual per-circuit revenue requirements of that transmission medium and, conversely, activating fewer circuits will increase the per-circuit revenue requirement for the other medium.

58. In this connection, we note that the service carriers have reduced the forecast of the number of circuits which will be needed in 1990 by approximately 26 per cent as compared with their June, 1980, forecast, (the forecast on which we relied in planning the TAT-8 and INTELSAT VI projects). Further, again subsequent to the planning of the TAT-8 and INTELSAT VI projects, it appears that technological developments have

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[35] Comsat's investment in INTELSAT space segment is not as rigidly fixed. The investment in INTELSAT space segment of Comsat and other INTELSAT signatories is determined by the use each signatory makes of that space segment. The signatories' investment shares are adjusted annually to reflect current use; thus, the investment of Comsat and the CEPT signatories could be reduced, to a degree, by the use of fewer satellite circuits on North Atlantic routes.

occurred which have either increased, or which may increase, the effective voice-circuit capacity of the TAT-8 cable and the INTELSAT satellites which will be in use during the 1986-1991 period. As a result, it now appears that there will be substantial excess capacity available throughout the 1986-1991 period. It seems apparent that creation of effective intermodal competition will not be facilitated by adoption of circuit-distribution guidelines which allow a disproportionate portion of the burden of this excess capacity to fall upon the satellite medium. We believe that adoption of the AT&T proposal, which would place 85 per cent of all of AT&T's international MTS growth circuits during the 1986-1991 period on cable facilities would have such a result. We thus do not believe that AT&T's suggested methodology proposes a reasonable use of facilities or that the public interest would be advanced by its implementation.

59. We tentatively conclude that allowing AT&T an annual two-per-cent increase in cable use (up to 60 per cent) represents a fair compromise which will stimulate the development of intermodal competition while not allowing the burden of excess capacity to fall too much on either medium. The approximately $90.1 million reduction in Comsat's revenues which would result from such an approach should give Comsat a strong incentive to enter the international MTS and other markets to try to offset that loss. Similarly, the approximately $66.3 million reduction in INTELSAT's revenues which would result from such an approach should spur that organization to greater construction and operational efficiencies. On the other hand, the amount of revenue loss to Comsat and INTELSAT, while signaling our clear intention to stimulate intermodal competition and to move away from any rigid methodology, is relatively manageable and should not result in any undue upward pressure on satellite tariff rates.

60. The two-per-cent-per-year guidelines should also provide AT&T with sufficient flexibility to adjust its facilities use to meet increasing competition during the transition period. Under these guidelines, AT&T can place up to 67.2 per cent of its IMTS growth circuits on its owned cable facilities. This is a greater percentage of cable-circuit use than we have permitted under any of our previous circuit-distribution guidelines.

61. We also tentatively conclude that these guidelines should remain in place during the entire 1986-1991 period. As we have indicated, our preference is at that time to remove ourselves from circuit-distribution decisions altogether. However, as pointed out by a number of the parties to this proceeding, we cannot now predict with certainty how competition will develop and whether in 1991 there will be a basis for reliance upon a

marketplace distribution of circuits.[36] Consequently, we cannot now commit ourselves absolutely to withdraw. As new entrants obtain operating agreements, and competition develops, our willingness to grant AT&T greater flexibility will increase.

62. *Alternative Proposal.* The creation of downward pressures on rates, the reduction of existing biases in the market, the encouragement of the efficient use of existing facilities, the promotion of the construction and use of efficient facilities in the future and the facilitation of our eventual withdrawal from loading decisions and perhaps the facility planning process may be directly related to the degree of competition in the provision of IMTS. Because the provision of international service is a joint undertaking between sovereign states or their carriers, competition tends to develop on a country-by-country basis rather than on a region-by-region basis. Thus, a methodology which permits greater flexibility on a regional basis, rather than on a country-by-country basis, may do little to satisfy our long term objectives. However, a methodology which ties flexibility to the acquisition of operating agreements and the establishment of an environment which enhances carrier and facility competition may more closely satisfy these objectives.

63. We therefore request comment on a multi-tiered methodology which would permit AT&T, on a country-by-country basis, less flexibility on routes characterized by little or no competitive entry and greater flexibility on routes characterized by greater competitive entry. While the number of tiers and degrees of flexibility are almost limitless, we specifically request comment on the following example in order to stimulate discussion and facilitate our analysis of this complex issue. Under this proposal, AT&T would be permitted to increase its loading flexibility by 1 per cent per year (Tier 1) to all countries and by 3 per cent per year (Tier 2) to countries where the administration had entered into operating agreements with additional IMTS providers and where competition was developing.[37] There would be no upper limit although the loading methodology would be re-examined by the end of 1991. To the extent that a more competitive IMTS market is encouraged and to the extent such a market stimulates a greater reliance on market forces, this proposal may not be dissimilar to the principles underlying the methodology submitted by NTIA. Of course, interested parties are also invited to submit and discuss any other specific methodologies which would relate relaxation of

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[36] Of course, if competition develops rapidly, we may revisit this issue prior to the end of the 1986-1991 period. In such a revisitation we could grant AT&T greater flexibility on a regional basis or on a country-by-country basis if competitive forces so warranted.

[37] Comments are solicited on whether the trigger mechanism should be the number of operating agreements, the terms of the operating agreements or other factors. We also seek comments on whether an increase in loading flexibility of greater than 3 per cent should be permitted.

loading guidelines to increased competition in the provision of IMTS on a country-by-country basis.

64. We are, of course, aware that knowledge of the circuit-distribution mechanism which will be in use after 1991 would be of significant assistance to the planning efforts of the carriers, Comsat and INTELSAT in selecting new facilities needed during the 1991-1995 portion of the planning period. For this reason, we shall soon begin to examine the facilities requirements and options available during that period, as well as the effect of various potential circuit distributions. While gathering the necessary information for that process, we shall also monitor the development of intermodal competition, competition in the provision of international MTS and the development of a marketplace circuit-distribution mechanism. The Office of Plans and Policy will also conduct a study of these issues. The extent to which effective competition develops will determine how much we need involve ourselves in developing formal guidelines for the construction of facilities and the distribution of circuits for the 1991-1995 period.

D. ARINC's Whole-Circuit Proposal

65. We tentatively conclude that ARINC's proposal that we require ownership in TAT-8 and future cables to be on a whole-circuit basis should not be considered in this phase of this docket. ARINC's proposal is not germane to the question of the circuit-distribution guidelines which should be adopted for use in the post-1985 period; nor will those guidelines affect ARINC's proposal. ARINC's proposal, however, if adopted, would effect major changes in the present structure of international facilities ownership and in the established operating relationships between the U.S. carriers and their overseas correspondents. We denied ARINC's request to require a whole-circuit-ownership policy with respect to TAT-8. More recently, ARINC raised its request at a meeting of the North Atlantic Consultative Process. That is the proper forum in which to address ARINC's proposal.

III. Ordering Clauses

66. Accordingly, pursuant to Sections 4(i), 4(j), 201-205, 214 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 201-205, 214, 403 (1976), IT IS ORDERED that a rulemaking is hereby INSTITUTED into the above-described issues.

67. IT IS FURTHER ORDERED that Aeronautical Radio, Inc., American Telephone and Telegraph Company, Communications Satellite Corporation, FTC Communications, Inc., GTE Service Corporation, GTE Sprint Communications Corporation, ITT World Communications Inc., MCI International, Inc., RCA Global Communications, Inc., TRT Telecommunications Corporation, Western Union International, Inc., and The

Western Union Telegraph Company are MADE PARTIES to the rulemaking initiated herein;

68. IT IS FURTHER ORDERED, pursuant to applicable procedures set forth in Sections 1.410 and 1.415 of the Commission's Rules and Regulations, 47 C.F.R. §§ 1.410 and 1.415 (1983), that, on or before May 10, 1985, all parties to this proceeding must file,[38] and other interested persons may file, comments on the issues in this proceeding and that, on or before May 28, 1985, interested persons may file reply comments. Before final action is taken in this proceeding we shall consider all relevant and timely comments filed. In reaching decision on this matter, we may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of our reliance upon such information is noted in our Report and Order. Participants must file an original and five copies of all comments. If participants want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. Those filing comments in this proceeding should serve copies thereof upon the persons named as parties in the preceding paragraph, *supra.* They should serve reply comments upon all those who file comments in this rulemaking. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

69. IT IS FURTHER ORDERED, that for purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time it issues a public notice stating that a substantive disposition of the matter is to be considered at a forthcoming meeting. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must

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[38] AT&T shall also file the circuit distributions and analysis required by footnote 33, *supra.*

be served on the Commission's Secretary for inclusion in public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* Section 1.1231 of the Commission's rules, 47 C.F.R. §1.1231 (1983).

70. IT IS FURTHER ORDERED that the motions of the Communications Satellite Corporation for late acceptance of its Comments and Final Comments are GRANTED.

71. IT IS FURTHER ORDERED that the request of Aeronautical Radio, Inc. to include the question of whole-circuit ownership in the issues to be considered in this Second Notice of Proposed Rulemaking in DENIED.

72. Pursuant to Section 605(b) of the Regulatory Flexibility Act (P.L. 96-354), IT IS CERTIFIED, that Sections 603 and 604 of that Act do not apply because these rule changes will not, if promulgated, have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. §§ 603, 604, 605(b) (1976). In addition, the Regulatory Flexibility Act does not apply to this proceeding because that Act excludes from its application all proceedings such as this that involve "a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting practices relating to such rates, wages, structures, prices, appliances, services, or allowances." 5 U.S.C. Section 601(2).

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

COMPARISON OF THE APPLICATION OF CIRCUIT DISTRIBUTION GUIDELINES TO AT&T'S U.S.–CEPT MTS TRAFFIC

YEAR	1986	1987	1988	1989	1990	1991	
AT&T FORECAST	18,392	21,538	25,229	29,538	34,498	40,300	

BALANCED LOADING* (see footnote on following page)

	C	$	C	$	C	$	C	$	C	$	C	$	
Percent Cable/Sat.	48.6	51.4	46.5	53.5	53.9	46.1	54.1	45.9	52.9	47.4	50.6	49.2	
No. of Cable/Sat. Cir.	8947	9445	10023	11515	13611	11618	15990	13548	18102	16396	20483	19817	
No. of Cable/Sat. Cir. Added	1579	1366	1076	2070	3588	103	2379	1930	2112	2848	2381	3421	

AT&T PROPOSAL

		C	$	C	$	C	$	C	$	C	$	C	$	
Percent Cable/Sat.		50.7	49.3	54.0	46.0	57.0	43.0	60.1	39.9	65.8	34.2	70.7	29.3	
No. of Cable/Sat. Cir.		9325	9067	11625	9913	14378	10851	17766	11772	22714	11784	28501	11799	
No. of Cable/Sat. Cir. Added		1957	988	2300	846	2753	938	3388	921	4948	12	5787	15	
Sat. Cir. Year Difference Compared to Balanced Loading			–378		–1602		–767		–1776		–4612		–8018	TOTAL –17153
Revenue Difference Compared to Balanced Loading	COMSAT	–$4.81M		–$20.38M		–$9.76M		–$22.59M		–$58.67M		–$101.99M		–$218.19M
	INTELSAT	–$3.54M		–$14.99M		–$7.18M		–$16.62M		–$43.17M		–$75.05M		–$160.55M

2 PERCENT INCREASED FLEXIBILITY PER YEAR — 60 PERCENT MAXIMUM

		C	$	C	$	C	$	C	$	C	$	C	$	
Percent Cable/Sat.		49.7	50.3	51.7	48.3	53.7	46.3	55.7	44.3	57.7	42.3	59.7	40.3	
No. of Cable/Sat. Cir.		9141	9251	11135	10403	13548	11681	16453	13085	19905	14593	24059	16241	
No. of Cable/Sat. Cir. Added		1773	1172	1994	1152	2413	1278	2905	1404	3452	1508	4154	1648	
Sat. Cir. Year Difference Compared to Balanced Loading			-194		-1112		-163		-463		-1803		-3576	TOTAL -7078
Revenue Difference Compared to Balanced Loading	COMSAT		-$2.47M		-$14.14M		+$0.80M		-$5.89M		-$22.93M		-$45.49M	-$90.12M
	INTELSAT		-$1.82M		-$10.41M		+$0.59M		-$4.33M		-$16.88M		-$33.47M	-$66.32M

COMPARISON OF THE APPLICATION OF CIRCUIT DISTRIBUTION GUIDELINES TO AT&T'S U.S.-CEPT MTS TRAFFIC

YEAR	1986	1987	1988	1989	1990	1991	
AT&T FORECAST	18,392	21,538	25,229	29,538	34,498	40,300	

2.5 PERCENT INCREASED FLEXIBILITY PER YEAR — 60 PERCENT MAXIMUM

		C	$	C	$	C	$	C	$	C	$	C	$	
Percent Cable/Sat.		50.2	49.8	52.7	47.3	55.2	44.8	57.7	42.3	60.0	40.0	60.0	40.0	
No. of Cable/Sat. Cir.		9233	9159	11351	10187	13926	11303	17043	12495	20699	13799	24180	16120	
No. of Cable/Sat. Cir. Added		1865	1080	2118	1028	2575	1116	3117	1192	3656	1304	3481	2021	
Sat. Cir. Year Difference Compared to Balanced Loading			-286		-1328		-315		-1053		-2597		-3697	TOTAL -9276
Revenue Difference Compared to Balanced Loading	COMSAT		-$3.64M		-$16.89M		-$4.01M		-$13.39M		-$33.03M		-$47.03M	-$117.99M
	INTELSAT		-$2.68M		-$12.43M		-$2.95M		-$9.86M		-$24.31M		-$14.60M	-$86.82M

3 PERCENT INCREASED FLEXIBILITY PER YEAR — 60 PERCENT MAXIMUM

		C	$	C	$	C	$	C	$	C	$	C	$	
Percent Cable/Sat.		50.7	49.3	53.7	46.3	56.7	43.3	59.7	40.3	60.0	40.0	60.0	40.0	
No. of Cable/Sat. Cir.		9325	9067	11566	9972	14305	10925	17634	11904	20699	13799	24180	16120	
No. of Cable/Sat. Cir. Added		1957	988	2241	905	2739	953	3329	979	3065	1895	3481	2121	
Sat. Cir. Year Difference Compared to Balanced Loading			–378		–1543		–693		–1644		–2597		–3697	TOTAL –10552
Revenue Difference Compared to Balanced Loading	COMSAT		–$4.81M		–$19.63M		–$8.81M		–$20.91M		–$33.03M		–$47.03M	–$134.22M
	INTELSAT		–$3.54M		–$14.44M		–$6.49M		–$15.39M		–$24.31M		–$34.60M	–$98.77M

*_/ The actual distribution of AT&T's U.S. -CEPT MTS circuits at year-end 1984 and its forecasted distribution of those circuits at year-end 1985 are as follows:

YEAR	1984		1985	
	C	S	C	S
Percent Cable/Sat.	48,14	51,86	47,7	52,3
No. of Cable/Sat. Cir.	6231	6713	7368	8079
No. of Cable/Sat. Cir. Added			1137	1361

Diversification of Control of Mass Media
Ownership and Management, Integration of
Reconsideration, Petition for, Denial of

> Review Board denies reconsideration of its *Decision*, FCC 85R-23, released March 13, 1985. Contingent integration proposal is not credited comparatively; only those integration proposals which are permanent and have a reasonable likelihood of effectuation are credited. A timely and unconditional divestiture pledge was credited.
> *Northern Sun Corp.*
> MM Docket No. 83-1050

FCC 85R-42

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Northern Sun Corporation Billings, Montana	MM Docket No. 83-1050 File No. BPH-820503AP
Billings Media Company Billings, Montana	MM Docket No. 83-1051 File No. BPH-820811AA
Bert E. Arnlund, d/b/a/ Arnlund Broadcasting Billings, Montana	MM Docket No. 83-1053 File No. BPH-820907AG
For a Construction Permit for a new FM Station	

MEMORANDUM OPINION AND ORDER

Adopted: May 7, 1985; Released: May 9, 1985.

BY THE REVIEW BOARD:

1. The Review Board has under consideration a petition for reconsideration filed April 12, 1985 by Billings Media Company (Media), an opposition filed by Northern Sun Corporation (Northern Sun), and a partial opposition filed by Bert E. Arnlund, d/b/a Arnlund Broadcasting (Arnlund). In our *Decision*, FCC 85R-23, released March 13, 1985, we granted the application of Northern Sun for authority to construct a new FM broadcast station to operate on Channel 279 at Billings, Montana, and denied the mutually exclusive applications of Media and Arnlund. Media finished last in the comparative evaluation largely because its proposal to integrate J. Stephen McClure, its 100% owner, as full-time general manager of the station was not credited. Because McClure would be integrated at Billings only if a Newberry, South Carolina FM broadcast application in which he was also proposed as full-time general manager were not granted, we found Media's proposal to be contingent and too "conditional and uncertain" an undertaking to receive comparative credit. In its petition for reconsideration, Media challenges this conclusion as unsupported by any "rational basis," as a by-product of "a new path" in comparative case law that should not apply retroactively to Media, and as inconsistent with our recognition of Northern Sun principal William Reier's pledge to divest his mass media interests. We deny Media's petition in all respects.

2. To begin, the Commission has long accorded "substantial importance" to full-time ownership participation in station operations as a decisional factor in the comparative evaluation process, *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395, 5 RR 2d 1901, 1909 (1965), and has long stressed that such "integration proposals be adhered to on a permanent basis," *id.* at n. 6 (citing *Tidewater Teleradio, Inc.*, 24 RR 643 (1961)). This reflects the Commission's policy view that full-time integration is a very strong element in predicting which applicant will render comparatively the best practicable service. *See id.* at 395, 5 RR 2d at 1909; *Committee for Community Access* v. *FCC*, 737 F.2d 74, 81 (D.C. Cir. 1984) (citing *Policy Statement, supra,* and *Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1016, 49 RR 2d 1138, 1159 (1981), *aff'd sub nom. Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 1774 (1983)).

3. To assure implementation of its integration policy, the Commission has so steadfastly required unequivocal promises of ownership participation that it was not until 1984 that the Board encountered the first attempts by applicants to secure comparative credit for contingent integration proposals. *See High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 55 RR 2d 627 (Rev. Bd. 1983), *review denied*, 56 RR 2d 1394 (1984) (Comm'n), and *Metro Broadcasting, Inc.*, 57 RR 2d 440 (Rev. Bd. 1984). In *High Sierra,* we viewed a principal's pledge to be integrated at the

proposed station "if the [subject] application is not granted until 1985, or if something unforeseen happens with his Placerville station" as evincing an intent *not* to be working at the proposed station. 96 FCC 2d at 431, 55 RR 2d at 634. We denied integration credit because "[a]cceptance of such a conditional and uncertain proposal would render the cut-off concept [deadline for firming up integration proposals] a nullity." *Id.* Subsequently, we applied this principle in disallowing credit for a contingent integration proposal in *Metro Broadcasting, supra,* 57 RR 2d at 450-451 and n. 9, and in *sua sponte* disallowing credit for the integration proposal in the case at bar, *Decision* at para. 3 (observing that McClure's integration proposal did not become unconditional "until *three months after* the hearing in this proceeding took place and the record was closed"). On the other hand, in contrast with the factual situations in the *High Sierra* and *Metro Broadcasting* cases, as well as the instant proceeding, we more recently approved an integration proposal in *Northland Communications,* FCC 85R-30, released April 8, 1985, where a contingent integration provision was satisfied prior to the ALJ's deadline for the submission of integration proposals (the relevant "cut-off date" in that case).

4. We adhere to our view that McClure's contingent integration proposal should not receive comparative credit. We regard this result as merely a corollary to the Commission's established policy of crediting comparatively only those integration proposals that are permanent and have a reasonable likelihood of effectuation, *see Berryville Broadcasting Company,* 70 FCC 2d 1, 8, 12, 44 RR 2d 1325, 1334, 1337-1338 (Rev. Bd. 1978); *Blancett Broadcasting Co.*, 17 FCC 2d 227, 230-231, 15 RR 2d 1349, 1354-1356 (Rev. Bd. 1969). It is also consistent with the time-honored integration axiom that "[w]here work proposals are stated in terms of a minimum and a maximum amount of time to be devoted to the station, *e.g.*, 10-20 hours per week, only the minimum or lesser amount of time will be credited, since the commitment can be met with the lesser number of hours," *Midwest Broadcasting Company,* 70 FCC 2d 1489, 1495 n. 11, 45 RR 2d 1, 7 n. 11 (Rev. Bd. 1979), because a contingent proposal can be fulfilled equally as well by the *absence* of actual ownership participation as by its presence.

5. Finally, we disagree with Media's contention that our nonrecognition of its contingent integration proposal is somehow inconsistent with our crediting Northern Sun's timely and unconditional pledge to divest its mass media interests and then assigning no diversification demerit to that applicant, *see Decision* at para. 4 (citing *WHW Enterprises, Inc.*, 89 FCC 2d 799, 813-14, 51 RR 2d 409, 419 (Rev. Bd. 1982), *rev. denied,* FCC 83-368 (Comm'n 1983), *rev'd in part and remanded on other grounds,* No. 83-2067 (D.C. Cir. February 5, 1985), and *Vacationland Broadcasting Co.,*

Inc., 97 FCC 2d 485, 488, 55 RR 2d 1299, 1302 (Rev. Bd.), *recon. denied*, 56 RR 2d 1260 (Rev. Bd. 1984)). Northern Sun's pre-"B" cut-off date divestiture pledge was timely and unconditional whereas Media's integration proposal was not; the condition Media placed on McClure's participation was not satisfied until three months after the hearing was held and the record was closed. To comparatively credit McClure's no-longer-conditional Billings integration promise now would be tantamount to permitting Media to amend its application, belatedly and without good cause, and would unfairly prejudice the competing applicants, Northern Sun and Arnlund, whose integration proposals were firm by the appropriate date. Such comparative upgrading cannot be allowed. *See, e.g., Alexander S. Klein, Jr.*, 86 FCC 2d 423, 434, 49 RR 2d 606, 615 (1981), *pet. for mod. of Decision denied*, 50 RR 2d 789 (1981); *Kent-Ravenna Broadcasting Co.*, 44 FCC 2669-2670, 22 RR 794, 795 (1961); *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143, 18 RR 2d 820, 824 (Rev. Bd. 1970); *see also Cleveland Television Corp.* v. *FCC*, 732 F.2d 962, 965 n. 2 (D.C. Cir. 1984); *Allied Broadcasting, Inc.* v. *FCC*, 435 F.2d 68, 70-71 n. 9 (D.C. Cir. 1970); *J.B. Broadcasting of Texas, Inc.*, FCC 85R-32, released April 22, 1985, at n. 3.

6. ACCORDINGLY, IT IS ORDERED, That the Motion to Strike filed April 29, 1985 by Northern Sun Corporation IS DENIED; and

7. IT IS FURTHER ORDERED, That the petition for reconsideration filed April 12, 1985 by Billings Media Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

Common Carrier, International
Submarine Cable

Commission tentatively concludes that construction of a fiber optic transPacific cable as early as 1988 would be in the public interest.
Pacific Planning
CC Docket 81-343

FCC 85-121

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Inquiry into the Policies to be Followed in the Authorization of Common Carrier Facilities to Meet Pacific Telecommunications Needs During the Period 1981-1995	CC Docket No. 81-343

FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: March 14, 1985; Released: March 28, 1985

BY THE COMMISSION:

I. Introduction

1. On November 21, 1983, we released a Notice of Inquiry (NOI) which initiated the second phase (Phase II) of the comprehensive facilities planning process in the Pacific Ocean Region (POR).[1] The first phase of this process focused on facilities needs in the POR for the 1982-1986 time

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[1] Pacific Planning (Notice of Inquiry, Phase II), FCC No. 83-515 (released November 21, 1983).

period and was concluded in December, 1982.[2] Phase II of this process focuses on facilities needs in the POR during the 1987-1995 time frame.

2. In the NOI initiating Phase II of the planning process, we stated that the proceeding would include an assessment of capacities and design lives of currently operating and proposed facilities in the region. We also indicated that we would consider a full range of facilities alternatives capable of meeting forecasted demand in the region during the planning period. We further stated that we would consider all available transmission media and viable technological designs as well as techniques for circuit multiplication. The issues of facilities use and restoration of service were also identified for consideration. Finally, the need, timing and configuration for the proposed fiber optic TRANSPAC-3 (TPC-3) cable were particularly raised.[3]

3. After release of the NOI, comments and reply comments were filed and a series of public meetings were held between members of the bureau staff and interested parties for the purpose of obtaining the necessary planning information and compiling a comprehensive record. Alternative facilities plans and traffic forecasts have been submitted and evaluated by the United States International Service Carriers (USISCs)[4] and Comsat. The task of assembling a comprehensive planning data base along the lines outlined in the NOI is complete. Therefore, in accordance with the procedures outlined in the NOI we are hereby entering the rulemaking stage of this proceeding.

4. The purpose of this Further Notice of Proposed Rulemaking (FNPRM or Further Notice) is to: (a) evaluate facilities alternatives

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[2] Pacific Planning (Report and Order, Phase I) 47 F.R. 57040 (December 22, 1982). The first phase focused on the issue of the Australia-New Zealand-Canada submarine cable (ANZCAN). ANZCAN is a joint venture of the communications entities of eight foreign governments linking Vancouver, Canada to Australia and New Zealand, with intermediate landing points in Hawaii, Norfolk Island and Fiji. We approved U.S. carrier participation in ANZCAN with a mix of both permanent (ownership) and temporary indefeasible right of user (IRU) interests. In the *Report and Order,* we contemplated based on existing demand forecasts that the temporary interests (short term IRUs) held by U.S. carriers in ANZCAN North (Canada to Hawaii segment) would terminate in the late 1980's and the traffic routed over those IRU-owned circuits would be rerouted over a fiber optic HAW-4 cable. We stated that authorizing a combination of permanent and temporary interests in ANZCAN North rather than authorizing the same number of permanent interests would encourage the introduction of fiber optic cables into the POR at the earliest prudent date. The *Report and Order* found that the construction of analog HAW-4 and TPC-3 cables in the late 1980's was not in the public interest.

[3] During the first phase, the Department of Defense (DoD) and the National Telecommunications and Information Agency (NTIA) strongly supported the introduction of a fiber optic TPC-3 cable which would be routed from Hawaii to Guam and then to Japan. Both parties asserted that the national security and commercial interests of the United States would best be served by the routing of the TPC-3 cable system through Guam.

[4] The USISCs include AT&T and the International Record Carriers (IRCs).

available for service in the POR during the 1987-1995 time period; (b) issue tentative findings regarding the acquisition and use of such facilities; and (c) request public comment on these tentative findings and the record compiled. In this Further Notice, we describe in Section II the facilities that now provide service in the POR and identify the major markets. In Section III the comments and replies received in response to the NOI are summarized. We then outline in Section IV the record compiled including basic planning data and information, the alternative plans submitted by the USISCs and Comsat, and the parties' evaluation of these plans. Finally, in Sections V and VI, we will discuss and evaluate the record before us and issue tentative findings (or identify options) governing future facilities alternatives during the 1987-1995 time period.

II. Major Markets and Current Facilities

5. Commercial communications between the United States and countries in the POR are transmitted via satellite and submarine cable. Seven jurisdictions, namely Japan, Australia, Philippines, Korea, Taiwan, Hong Kong and Singapore account for approximately 85% of total U.S.-POR traffic. Three of these countries, Japan, Australia and the Philippines account for over 50% of this traffic.

6. Satellite capacity in the POR is currently provided by an INTELSAT IV-A Primary satellite and an INTELSAT IV-A Operational Spare.[5] In 1986 the two INTELSAT IV-A's will be replaced by an INTELSAT V Primary satellite and an INTELSAT V Operational Spare. In 1987 the INTELSAT V Primary will be replaced by an INTELSAT V-A satellite. Also in 1987 the INTELSAT V Operational Spare will become solely a spare satellite and an INTELSAT V-A satellite will be introduced into the region as the Major Path satellite. In 1991 the Primary and Spare are scheduled to be replaced by INTELSAT VI (or INTELSAT VI follow-on) satellites. The Major Path satellite is scheduled to be replaced by an INTELSAT VI (or INTELSAT VI follow-on) satellite in 1993.[6] Currently, approximately 70% of U.S. traffic in the POR is routed over satellite. Ten POR countries[7] are currently served solely by satellite for U.S. traffic.

7. Two transpacific cable systems (TPC-1 and TPC-2) together with various regional cable systems connect the U.S. Mainland/Hawaii with

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[5] In an operational spare configuration, both the primary and spare satellites are used to carry traffic. However, the sum of the traffic on the primary and operational spare does not exceed the capacity of either satellite. The advantage of splitting traffic between two satellites is that path diversity is increased.

[6] We previously authorized Comsat to participate in an INTELSAT procurement program for nine INTELSAT V, six INTELSAT V-A, and five INTELSAT VI satellites.

[7] The ten countries served solely by satellite are: Brunei, Peoples Republic of China, French Polynesia, Marshall Island, Micronesia, New Caledonia, Tonga, American Samoa, Saipan, and Western Samoa.

twenty-eight POR jurisdictions. (See Appendix 1 for diagram of existing POR cables.)[8] Hawaii and the U.S. Mainland are connected by three major cables (HAW 1, 2 and 3). Cable circuits providing voice service to all major markets with the exception of U.S.-Australia, Fiji, and New Zealand via the ANZCAN cable are currently saturated. Limited growth remains for cable circuits providing non-voice traffic over these routes. Furthermore, many of the major cable systems in the POR will reach the end of their design life during the planning period.[9] Cables carry approximately 30% of the U.S.-Pacific Basin traffic.

III. Summary of Comments and Replies

8. Comments to our NOI were filed on January 4, 1984 by State of Hawaii, GTE Sprint and Comsat. Joint comments were filed by the following USISCs: American Telephone and Telegraph Co. (AT&T), Hawaiian Telephone Co. (HTC), FTC Communications, Inc. (FTCC), ITT World Communications Inc. (ITTWC), RCA Global Communications, Inc. (RCA), TRT Telecommunications Corporation (TRT), The Western Union Telegraph Company (WU), and Western Union International, Inc. (WUI).[10] Reply comments were filed on January 18, 1984 by AT&T, Comsat, State of Hawaii, GTE Sprint, RCA, ITTWC, and the Department of Defense (DoD).

9. *Comments.* All the commenters supported our commencement of the second phase of the planning process in the POR. In joint comments filed on behalf of itself and seven other USISCs, AT&T indicated that the USISCs and their foreign correspondents view a fiber optic TPC-3 cable with a ready for service (RFS) date of 1988 as desirable. AT&T also noted the comments of NTIA and DoD during Phase I of the planning process urging that any such cable system include a Guam landing point and stated that some of the alternative facility plans being discussed and evaluated by the USISCs and their foreign correspondents include a Guam landing point.

10. In its comments, Comsat stated that the first priority in Phase II should be a demonstration of the need for, and attendant timing of, additional facilities during the 1987-1995 planning period. In this regard,

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[8] Direct cable service is provided to twelve POR countries. The remaining sixteen countries are served by transiting those countries served directly.

[9] The following cables have reached the end of their design life or will reach the end of their design life during the planning period. COMPAC-1984 (81 basic voice grade circuits); HAW-1 — 1984 (51 basic voice grade circuits, 37 derived); HAW-2 — 1989 (143 basic voice grade circuits, 37 derived); SEACOM-1 — 1987 (82 basic voice grade circuits); SEACOM-2 — 1990 (166 basic voice grade circuits); TPC-1 — 1989 (142 basic and 29 derived voice-grade circuits between Hawaii and Guam and 138 basic voice-grade circuits between Guam and Japan.

[10] The parties filing joint comments also plan to be joint owners of the proposed cable system.

Comsat stated that the possible introduction of a fiber optic TPC-3 cable later than in 1988 must be considered and evaluated against forecasted demand and capacity available on other existing and planned facilities. Comsat also stated that a Master Plan for facilities utilization should be developed even if such a plan only has the status of a "guideline." Comsat further suggested that in Phase II the Commission should only consider facilities deployed through 1991 although forecasts should be provided through 1995. Comsat believes that we do not have sufficient information to recommend facilities alternatives beyond 1991.

11. The State of Hawaii urged us to require a "showing of full, effective, and efficient utilization of available and authorized facilities before authorizing additional facilities," noting that it believes there is a "serious question" about whether the U.S. carriers and their foreign correspondents are fully using modern circuit multiplication technology. Hawaii said the U.S. carriers' own information filed with the Commission "shows the very significant difference in revenue requirements of submarine cable and satellite facilities; the cost of satellite facilities is dramatically lower." Hawaii requests that we consider the revenue requirements which may be imposed upon users through the authorization of additional facilities that may not be required. Hawaii desires that we carefully examine the revenue requirements of the carriers and not authorize acquisition of a new facility out of considerations of international comity—that is, because the U.S. carriers' foreign correspondents desire it—unless such facilities are actually needed.

12. GTE Sprint supported the construction of a fiber optic TPC-3 cable system in 1988 and said it plans to offer "international voice and other services" in the Pacific region in the near future. GTE Sprint supplied estimated circuit needs for countries with which it desires to obtain operating agreements for the provision of voice and other services over the next 10-year period.

13. *Replies.* In its reply comments, AT&T stated that it believed it appropriate to examine in Phase II all facilities to be deployed through 1995. AT&T also stated, in response to the State of Hawaii, that full utilization of existing facilities and the most up-to-date technologies will be considered in the development of the alternative plans. AT&T further stated its belief that the concept of a Master Plan should not be permitted to frustrate the Commission's intent to permit market forces to regulate circuit activations. AT&T stated that it would supply implementation schedules with its alternative plans disclosing proposed facility utilization. AT&T indicated that the facilities utilization information supporting each plan would be sufficient to allow the Commission to evaluate the plans and to monitor facilities usage without adopting a detailed Master Plan. AT&T strongly disagreed with Hawaii's position that we should disregard

international comity in developing policies and guidelines for POR facilities planning. AT&T stated that international comity should be an essential element in the development of policies and guidelines for POR facilities.

14. GTE Sprint, in its reply, stated that the TPC-3 cable should be introduced in 1988. GTE Sprint indicated that a new facility is critical because of the size of the USISC circuit forecasts and the possibility of additional carriers entering the market. GTE Sprint further stated that circuit forecasts supplied by the carriers in the instant proceeding be viewed as a rough gauge rather than an exact determination of future circuit needs. GTE Sprint indicated some apprehension that a limitation of authorized circuits strictly to the number proposed by those participants in the planning process could constrain the ability of new carriers to acquire circuits. GTE Sprint also agreed with Comsat that the planning process should only consider facilities that are to be deployed in the 1987-1991 timeframe because it would be difficult to gauge what facilities will be needed in the years 1992-1995.

15. RCA replied that the State of Hawaii is misguided in suggesting that we include revenue requirements as part of our analysis. Such an approach, argued RCA, "disregards the Commission policy which considers factors such as diversity, redundancy, restoration and economy to assure that future requirements for communications services are met." According to RCA, we have looked at only "historical and/or projected investment and operating expenses as opposed to tariff rates as proposed by the State of Hawaii." RCA further states that a requirement to show full and efficient use of existing facilities as proposed by Hawaii would limit competition and competitive options.

16. In its reply, the State of Hawaii reiterated its position regarding revenue requirements and full, efficient use of existing facilities. The State maintained that more specific information was required from the USISCs and Comsat so that the public would not be saddled with additional and unnecessary revenue requirements. The State declared that the information heretofore submitted by the USISCs in their comments did not provide a sufficient showing of the extent to which all current and authorized facilities are projected to be fully, effectively, and efficiently utilized during the 1987-1995 period.

17. ITT stated in its reply that a Master Plan is at best a planning tool which provides a mechanism for evaluating whether a need exists for additional facilities. ITT believes that such a plan should not be used to specify loading criteria. However, ITT agreed with Comsat that the Commission should focus only on those facilities planned for deployment through the end of 1991 because of the uncertainty as to what facilities will be needed from 1992 to 1995.

18. In its reply, Comsat reiterated the position presented in its initial comments that sufficient capacity exists in the POR to handle forecasted demand at least through 1991 and that construction of TPC-3 prior to this date unnecessarily burdens ratepayers. Comsat further stated that the April, 1983 traffic forecast submitted by the USISCs in their comments be reviewed as a first step in the process to make certain it is not outdated. Comsat also expressed its concern that the alternative plans which have been developed by the USISCs and their foreign correspondents do not represent the full range of alternatives which should be addressed. Comsat believes that we are engaged in a process which should concern itself with the furtherance of the U.S. public interest as opposed to the interests of our foreign correspondents. Comsat does not want the interests of our foreign correspondents to be applied "a priori" to screen alternative plans.

19. DoD's reply stressed that national defense and security interests require a fiber optic TPC-3 cable linking the U.S. mainland with Guam and Japan. DoD maintains that the diversity and redundancy provided by such a cable system is necessary for critical U.S. government and private sector communications. DoD believes that cost and technology are not the only significant concerns in assessing the quality of service of any facilities plans. DoD further believes that from a national defense and security standpoint service reliability during the period after a facility failure is an extremely important factor in considering the deployment of a fiber optic cable in 1988.

IV. Summary of the Record Compiled

20. The record compiled contains three major segments: (a) basic planning data and information (i.e., demand forecasts, facility data, and cost elements); (b) alternative facilities plans; and (c) carrier analysis and evaluation of plans. The basic planning data is used by the carriers and Comsat to generate alternative plans designed to meet traffic demands throughout the planning period. The plans consist of various combinations of new facilities introduced in the Pacific region at various times.

A. Basic Planning Data and Information

21. *Demand.* The demand forecasts for voice and non-voice traffic used in the preparation and evaluation of all the alternative plans were prepared by AT&T and the IRCs. A March 1984 traffic forecast was submitted by the USISCs to update their April 1983 forecast. The updated forecast reflects the best information available using individual country econometric models and historical growth trends in traffic. Comsat independently forecasts international television traffic demand but does not do any forecasting of message telephone and record service. The forecast of traffic demand on international satellites is obtained by

Comsat and INTELSAT directly from the carriers and their foreign correspondents annually at the INTELSAT global traffic meeting. The March 1984 forecast shows an average annual growth rate of approximately 16% during the 1985-1995 time period from 5800 circuits in 1985 to approximately 26,000 circuits by 1995.[11] The four alternative plans propose different ways of accommodating this growth.

22. *Facility capacity data.* Comsat submitted data regarding facility capacity available for U.S. Mainland/Hawaii-Pacific basin traffic for the three INTELSAT spacecraft series that are proposed to be deployed during the planning period. The capacity estimates are given in 6/4-GHz band with various modulation/access techniques including FDMA/FDM/FM, CFDM with 32 or 64 Kbps TDMA/DSI,[12] and ACSSB with 32 or 64 Kbps TDMA/DSI.

The facility capacities for the satellites are as follows:

	FM (no circuit Multiplication)	*CFDM+ 64 Kops TDMA/ DSI*	*CFDM+ 32 Kops TDMA/ DSI*	*ACSSB+ 64 Kbps TDMA/ DSI*	*ACSSB+ 32 Kbps TDMA/ DSI*
INTELSAT V Primary (Mainland/Hawaii - Pacific Correspondents) to be deployed year-end (1986)	4350	7890	N/A	N/A	N/A
INTELSAT V-A Primary (Mainland/Hawaii - Pacific Correspondents) to be deployed year-end (1987)	4950	8910	11280	13920	16290
INTELSAT V-A Major Path (Mainland/Hawaii - Pacific Correspondents) to be deployed year-end (1987)	4840	8590	11010	13310	15720
INTELSAT VI (Mainland/Hawaii - Pacific Correspondents) to be deployed year-end (1991)	7450	15800	25280	20640	30120

23. Two major cable systems (TPC-1 and TPC-2) currently carry traffic in an east-west direction across the Pacific Ocean. TPC-1, which is

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[11] This forecast does not include international television or domestic transponder requirements. It appears that the demand for occasional use international television services in the POR during the planning period is relatively small and can be carried by the two designated TV transponders on the Primary satellite. At the present time INTELSAT leases on a pre-emptible basis 4.5 (36 MHz bandwidth) transponders in the POR. While the number of transponder leases for the POR for the 1985-1995 period may increase, the pre-emptible nature of these leases makes their inclusion into a demand forecast problematic.

[12] TDMA and DSI are acronyms for time division multiple access and digital speech interpolation, respectively. Use of TDMA, rather than the frequency division multiple access currently used will increase the number of circuits on a given satellite transponder by 50-60 percent. DSI equipment operates in much the same fashion as circuit multiplication equipment used on cables and approximately doubles the number of circuits used for message telephone services. TDMA/DSI should be available in the POR in 1987-88.

scheduled to be retired in 1989, has 171 voice grade circuits from Hawaii to Guam and 138 voice grade circuits from Guam to Japan. TPC-2, which is scheduled to be retired in 2000, has 845 basic voice grade circuits from Hawaii to Guam and 845 basic voice grade circuits from Guam to Okinawa. Circuits in TPC-1 and TPC-2 which are used to provide voice services are presently multiplexed with TASI equipment which doubles the capacity of these circuits. The USISCs submitted data regarding the assumptions used to evaluate existing and projected cable capacities during the planning period. Anticipating the use of circuit multiplication equipment, the USISCs utilized a 2:1 ratio on analog cables and a 5:1 ratio for voice circuits on fiber optic cables. Fiber optic cable capacity was estimated as follows: a 140 mb/s cable is assumed to be equal to 10,000 equivalent voice circuits (with digital circuit multiplication equipment) and a 280 mb/s cable is assumed to be equal to 20,000 equivalent voice circuits (with digital circuit multiplication equipment).[13]

24. *Cost Elements*. The fiber optic cable systems costs are based on the TAT-8 cable costs[14] (adjusted to 1983 dollars) and include the cost of Dynamic Bit Compression Multiplex (DBCM) equipment. Depending on the particular plan, these costs range from about $500 million to nearly $800 million.

25. Unbundled space segment and earth station charges are currently found in Comsat's tariff. The unbundled space segment rate is $655 per half circuit per month. The unbundled earth station rate is $405 per circuit month.[15]

26. Comsat submitted the following cost elements for satellite facilities during the 1987-1995 period: each INTELSAT VI spacecraft is estimated to cost $69 million (in year-end 1983 dollars). Comsat estimates the launch cost to be $50.7 million per spacecraft. The capital cost of each TDMA reference station entering service in the POR after January 1, 1987 is expected to cost $1.45 Million. Comsat believes that existing U.S. earth stations and antennas are sufficient to meet forecasted traffic. If another Standard A earth station were added, its cost is estimated at $4.0 million.

B. Alternative Plans

27. Four alternative plans were presented by the parties, two submitted by the USISCs and two submitted by Comsat. All the plans submitted take into account: (a) currently operating facilities in the region; (b)

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[13] These figures are based upon the TAT-8 project. A maximum of two working fiber pairs has been assumed for planning purposes. It should be noted that capacity employed for the transmission of record/data cannot be multiplied in the same manner or to the same extent as capacity used for voice services.

[14] American Telephone and Telegraph Co., FCC 84-240 (released June 8, 1984).

[15] *See* Comsat Tariff F.C.C. No. 101.

available transmission media, including techniques for circuit multiplication[16]; (c) a comparison of actual use relative to available capacity and design life; and (d) criteria for maintenance of service reliability. All four plans assume that INTELSAT V-A satellites will be deployed in the POR as the primary and major path satellites in 1987. The third and fourth INTELSAT VI spacecraft successfully placed in orbit will be deployed to the Indian Ocean Region to replace the INTELSAT V-A spacecraft serving as the Indian Primary and Spare satellites.[17] It is these INTELSAT V-A spacecraft that are currently planned to be relocated to the POR in 1987. The plans also assume that an INTELSAT VI or follow-on satellite will be deployed as a Primary Path and Spare satellites in the POR in 1991.[18] Following is a description of plans submitted.

1. USISCs Plans

28. The USISCs and their foreign correspondents in the Pacific have engaged in a planning effort and have evaluated various facilities alternatives for the 1987-1995 time period. The USISCs and their foreign correspondents developed ten facility plans[19] based on a bilaterally negotiated forecast obtained from the April 1983 Data Gathering Meeting. Further analysis and meetings reduced the number of plans to two: Plan II-A (Mod. 4) and Plan III Modified. (See Appendices 2 and 3 for diagrams of the proposed plans.)

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[16] Circuit multiplication equipment exploits the fact that pauses occur in normal conversation between persons. This equipment senses these pauses and routes portions of other calls to the momentarily idle circuits so as to derive the most efficient use of all available circuits.

[17] The first two INTELSAT VI spacecraft are scheduled to be deployed in the North Atlantic in 1986/87.

[18] We have authorized Comsat to participate in the procurement of five INTELSAT VI satellites. However, it is not clear that these particular satellites will be the ones used in the POR or if a VI follow-on will be used. *See*, Communications Satellite Corporation, FCC 84-236 (released May 25, 1984). Several satellite configurations are under consideration by INTELSAT as INTELSAT VI follow-on spacecrafts.

[19] There were six plans and four variations to these plans.

Plan II-A(Mod.4)[20]

29. This plan introduces fiber optic cable systems in the POR starting in 1988 linking the U.S. Mainland and Hawaii to Japan and Guam via an underwater branching unit located near Guam. Additional cable systems would then be deployed west of Guam and Japan to Korea, Hong Kong, Taiwan and the Philippines. These cables would form a ring from Japan to Korea to Hong Kong to the Philippines to Guam and back to Japan. According to the record submitted, this plan is preferred by the USISCs and their foreign correspondents.

30. The total first cost of this proposed cable system is approximately $733 million.[21] The U.S. share is approximately $320 million.[22] The total first cost of landing in Guam is $67 million.[23]

The following cable systems comprise Plan II-A(Mod. 4):

From-To	*Cable Name*	*Service Date*	*Capacity* *Mbit/s*	*Capacity* *Mauo*[24]
Mainland-Hawaii	MA-HA (HAW-4)	1988	2×280	7560
Hawaii-Japan*	HA-JA	1988	1×280	3780
Hawaii-Guam*	GU-HA	1988	1×280	3780
Guam-Philippines	GU-PH	1988	1×140	1890
Japan-Korea*	JA-KO	1990	1×140	1890
Japan-Hong Kong*	JA-HK	1990	1×140	1890
Hong Kong-Philippines	HK-PH	1990	1×140	1890
Philippines-Taiwan	PH-TA	1994	1×140	1890
Guam-Japan	GU-JA	1988	1×280	3780

* indicates fiber in a Branching Unit cable

31. According to the USISCs, Plan II-A(Mod 4) allows greater flexibility for routing and the ability to restore via digital cables most links in the network. According to the USISCs, this configuration also promotes

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[20] Plan II-A (Mod 4) has undergone two major changes. The USISCs first submitted as part of the record a similar plan, Plan II-A (Mod.) This plan differed from the present plan in two respects: First, the entire plan was more expensive ($786 million as opposed to $733 million). Second, the Hong Kong-Philippines cable was planned for 1988 (not 1990). The USISCs withdrew this plan and submitted a new plan, Plan II-A (Mod. 2) which connected Japan with the Philippines in a self-protecting ring. This plan cost $719 million. On November 15, 1984, the USISCs submitted the present Plan II-A (Mod. 4) which reflects the increased participation of Hong Kong and will be discussed in detail below. *See*, letter of J.A. McEntee, Deputy Director, International Long Range Planning ATT - Communications to Stuart Z. Chiron, Chief, International Policy Division, November 15, 1984.

[21] First cost is the capital investment associated with a new facility. The USISCs computed first cost in 1983 dollars.

[22] The cost to Japan is approximately $129 million (in 1983 dollars).

[23] That is, it would cost approximately $67 million less to deploy a ring configuration without a Guam landing point.

[24] A MAUO represents the unit of measure for ownership purposes similar to the single circuit of analog cables.

service reliability in terms of improved media and route diversity. The USISCs further maintain that this plan provides for a network which can easily be expanded at minimal cost to connect Australia and Singapore in the mid 1990's. This plan also reflects the increased participation of Hong Kong in the overall project.

Plan III Modified

32. Plan III Modified introduces fiber optic cable systems starting in 1988 linking the U.S. Mainland with Hawaii and Japan. Additional cable systems would then be deployed west of Japan to Korea, Hong Kong, Taiwan and the Philippines. This "non-ring plan" does not provide for a Guam landing point. The total first cost of this plan is $588 million.

The following cable systems comprise Plan III-Modified:

From-To	*Cable Name*	*Service Date*	*Capacity*	
			Mbit/s	*Mauo*
Mainland-Hawaii	MA-HA (HAW-4)	1988	2×280	7560
Hawaii-Japan*	HA-JA	1988	2×280	7560
Japan-Philippines	JA-PH	1988	1×280	3780
Japan-Korea*	JA-KO	1988	1×280	3780
Philippines-Taiwan	PH-TA	1994	1×140	1890
Philippines-Hong Kong	PH-HK	1988	1×140	1890

33. According to the record, Plan III Modified is acceptable but not preferred by the USISCs or their foreign correspondents. Although cheaper than Plan II-A(Mod 4) the USISCs maintain that this plan does not provide comparable flexibility in routing. It also does not offer the ability to restore via digital cables any portion of the network.

2. Comsat's Plans

34. Comsat submitted two plans. Comsat Plan 1A is based on the lightguide network proposed by the USISCs in Plan II-A(Mod 4).[25] Comsat Plan 2A is based on the lightguide network proposed by the USISC in Plan III Modified. Comsat proposes to defer implementation of the fiber optic cable systems proposed in both plans for three years until 1991. Comsat maintains that existing cables and satellites will provide sufficient capacity to accommodate growth from 1988-1991. Comsat states that a three year delay would keep TPC-3 out of AT&T's rate base for three years and would save ratepayers $120 million (in 1983 dollars).

35. In its filings, Comsat argues that more than adequate satellite capacity will exist in the planning period to accommodate expected traffic growth. Comsat submitted data to show that existing and proposed satellite configurations for the region can provide sufficient capacity at

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[25] Comsat Plan 1A is actually based on the originally submitted USISC Plan II-A (Mod.). Since this plan is closely related to the USISC Plan II-A (Mod. 4), Comsat's comments on Plan II-A (Mod.) will be considered as applying to Plan II-A (Mod. 4).

least through 1991 and may provide an aggregate capacity of over 60,000 U.S. Mainland/Hawaii Pacific channels by 1995.[26] Comsat also maintains that quality of service will not suffer if the cable system is delayed for three years and that services that can be provided over digital cables can also be provided over satellites.

C. The Parties Evaluation of the Alternative Plans

36. The U.S. International Service Carriers and Comsat analyzed the four alternative plans from the standpoint of forecasted demand, facility capacity and demand flexibility, service quality, cost, technological risk, and correspondent acceptance. The USISCs prefer Plan II-A (Mod. 4) and state that this plan best accommodates forecasted traffic in the region during the planning period. On the other hand, Comsat believes that existing cable and satellite facilities can accommodate growth in the region until at least 1991. Comsat asserts that its plans, which defer the USISCs plans for three years are the preferred way to accommodate traffic in the POR during the planning period.

1. Forecasted Demand, Capacity and Demand Flexibility

37. The USISCs and Comsat agree on the traffic forecasts complied by the USISCs and Comsat as well as the capacities of existing and proposed facilities. They also agree that an abundance of satellite capacity will exist throughout the planning period.[27] Comsat calculates that there is adequate capacity on the primary and major path satellites to accommodate all forecasted traffic during the planning period without the deployment of circuit multiplication techniques such as TDMA/DSI. Comsat also states that with the deployment of TDMA/DSI there is the potential for at least twice and perhaps three times the capacity needed to accommodate growth in the region.

38. Demand flexibility means that capacity is available or could be derived to accommodate unforeseen changes in demand. Both the USISCs and Comsat conclude that under any of the four alternative plans, there will be more than ample capacity to accommodate projected traffic requirements and any unforeseen changes in demand throughout the planning period.

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[26] Comsat's plan shows that the INTELSAT V satellite will function as a Primary Path and Operational Spare in 1986. In 1987, the INTELSAT V Primary Path will be replaced by the INTELSAT V-A. In addition, a V-A will also serve as a Major Path satellite. This configuration remains intact until 1991, when INTELSAT VI or follow-on satellites are planned to be deployed as the Primary Path and Spare satellites.

[27] The carriers estimate that if all POR traffic were to be placed on satellites, including the off-loading of all existing cables, satellite utilization would never exceed 36% through 1991.

39. The USISCs state that this excess satellite capacity demonstrates that the satellite planning engaged in by Comsat and INTELSAT is deficient. The USISCs also state that since so much excess satellite capacity is projected during the planning period, a relatively low traffic forecast and demand flexibility are essentially meaningless and should not be reasons for delaying the implementation of the cable system. On the other hand, Comsat argues that if the USISCs' preferred plan is approved in 1988, satellite capacity would be "underutilized and lie fallow."

2. Service Quality

40. The USISCs and Comsat analyzed the service quality provided by the plans in terms of media (cable and satellite) diversity, path diversity restoration and loading. Media diversity is provided by the use of more than one transmission medium to carry a correspondent's traffic. Media diversity protects against the systemic failure of one medium. Path diversity is obtained through the use of a number of independent routes to carry traffic to a given correspondent and is one means to maintain an adequate grade of service if any one path fails.

41. The USISCs maintain that their preferred Plan II-A(Mod4) significantly enhances both media and path diversity. The USISCs state that a new cable route will increase path diversity regardless of the satellite configuration in Comsat's plans. The USISCs also maintain that the cable/satellite radio of its plans is 61/39 in 1995 if the countries served solely by satellite are excluded from the analysis. If the countries served solely by satellite are included, then the satellite share in the mid-to-late 90's is 48 percent. Comsat claims that the path diversity provided in the USISC plans is no better than the path diversity provided in its own plans and that the media diversity in the USISC preferred plan is unacceptable because the satellite ratio in this plan declines from 70% to 30%.

42. The USISCs and Comsat also analyzed the plans in terms of their ability to restore circuits in case of a facility outage. The USISCs state that the preferred Plan II-A (Mod. 4) is best able to restore failed circuits since it provides for a self-restoring ring from the branching unit to Japan, Hong Kong, the Philippines, Guam and back to the branching unit. The USISCs maintain that their non-ring Plan III-Mod has no inherent restoration capabilities and must rely solely on restoration by satellites in case of a facilities outage. Under the USISC plans, satellite facility outages can be restored via the operational spare satellite and for the first time by digital cables, although coverage is limited. Comsat maintains that its plans provide the same ability as the USISC plans to restore circuits in case of a facilities failure because of the presence in the region of an operational spare satellite throughout the planning period. Comsat

also states that such capability is necessary to restore service to countries not served by the proposed fiber optic network.

43. Loading is the manner by which circuits are distributed among available transmission paths, both cable and satellite. A balanced loading methodology is now used in the Pacific Region and Comsat supports the continued use of this loading policy. Under a balanced loading approach, circuits are distributed among satellite and cable facilities in a manner which results in non-saturated facilities carrying equal numbers of circuits.[28] The USISCs propose using a loading methodology based on a mix of satellite and cable circuits bilaterally negotiated between the USISCs and their foreign correspondents. Comsat objects to the loading approach proposed by the USISCs. Comsat believes that such a cable/satellite mix will be formulated without consideration of relative economics and without its participation. Comsat also is concerned that the market power of the USISCs, particularly AT&T, will work to Comsat's disadvantage. In response, the USISCs state that the bilaterally negotiated loading scheme they propose is based upon economic criteria that look at each correspondent pair's relative costs of satellite and cable. The USISCs further maintain that the process they will employ with their foreign correspondents is similar to that employed at the INTELSAT Global Traffic Meeting in which all signatories meet and decide the number of circuits to be placed on satellite for five or more years in the future.

3. Cost Analysis

44. The cost of each of the alternative facilities plans was estimated by AT&T and Comsat. Both parties express the individual cost of a plan in terms of the discounted present worth of expenditures.[29] However, the parties employ different methods and assumptions for estimating the cost of the various plans. AT&T uses two methods for estimating cost — a "use" and an "investment" method. The AT&T "use" method includes the USISC portion of the total investment and operating cost outlays for new

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[28] The policy was developed in Docket 18875 planning proceedings as a result of negotiations between the U.S. and European PTT's. The policy expires by its own terms at year-end 1985 in the North Atlantic. *See*, Policies for Overseas Common Carriers, 82 FCC 2d 407, 431 n. 18 (1980).

[29] In the USISC analysis, the Present Worth of Expenditures (PWE) represents the sum of the present worth of future capital investments (PWFC) and the present worth of future annual expenses (lease costs are used for satellites, capital investments are used for new cables). PWFC represents the worth of some future capital investment adjusted back to 1983 dollars. The discount rate (the percentage used to discount expenses) is stated in real terms. A real discount rate of 4% is used to calculate PWE. In Comsat's analysis, the PWE also includes the net present value of incremental costs for cable and satellite facilities of associated operational and maintenance charges (0 & M), incremental purchases of IRUs in foreign cables, appropriate transit charges and 0 & M on existing facilities.

cable systems introduced during the planning period, together with the estimated annual per circuit Comsat lease (tariff) charge for international satellite circuits. The AT&T "investment" method also includes the USISC portion of total investment and operating cost outlay for new cable systems. For satellites, an allocated portion of the total investment and operating cost associated with all the satellites of the various satellite series introduced into the region during the planning period is included. The portion of total INTELSAT satellite costs allocated to the U.S. in the Pacific region is determined by the planned use of a given satellite facility by the U.S. carriers in the Pacific region relative to its use by the foreign entities in the Pacific and its use in other ocean basin regions. Both the use and investment method employed by AT&T include all cable costs associated with providing U.S. Mainland/Hawaii service for those cable systems that are newly introduced into the Pacific Ocean Region during the planning period.

45. Comsat's cost estimates for the plans are based upon a single investment related methodology. The Comsat approach includes the USISC portion of total investment and operating costs for new cable systems in a similar manner to that employed by AT&T in both its methods. In calculating the satellite portion of the cost associated with an individual facility plan, Comsat includes an allocated portion of only the total incremental investment and operating costs associated with satellite facilities serving the Pacific region. Comsat assumes that the only relevant incremental satellite costs are those associated with satellite facilities for which investment decisions by INTELSAT have not already been made as of the beginning of the planning period. This means that any satellite series prior to the INTELSAT VI (scheduled to be introduced in the Pacific region in 1991) is not included in the Comsat cost analysis. This differs significantly from the AT&T investment method approach in that AT&T includes an allocated portion of INTELSAT satellite costs (based upon relative use) for the INTELSAT series V, VA, and VI in its analysis. For the INTELSAT VI satellite series that is included in the Comsat analysis, an allocation mechanism based upon relative use of the satellite by U.S. carriers in the Pacific region is employed by Comsat to allocate a portion of the overall satellite system cost to the Pacific plan.[30]

46. As a result of these different cost methodologies, the USISC cost of the plans and the Comsat cost of the same plans are very different. The AT&T and Comsat cost analyses for the USISCs' preferred plan are

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[30] Other minor differences in cost assumptions also exist between the AT&T and Comsat methods. See the respective cost submissions of the carriers in the record for details.

presented in the following table. The costs shown are the U.S. carriers' share of the total costs of the proposed cable system.

Comsat Investment Related Method	*Cable*	*Satellite*	*Total*
Comsat Plan 1A	$138.75M	$99.32M	$238.07M
Plan IIA Modified	$260.00M	$94.63M	$354.63M
USISC Investment Related Method with Residuals[31]			
Comsat Plan 1A	$66.6M	$100.8M	$167.4M
USISC Plan IIA Modified	$155.2M	$44.9M	$200.1M
USISC Use Related Satellite Method with Residuals			
Comsat Plan 1A	$66.6M	$155.6M	$222.2M
USISC Plan IIA Modified	$155.2M	$52.9M	$208.1M

47. Utilizing Comsat's investment related method the USISC preferred plan costs $354.63M (net present value of incremental expenditures) while Comsat's Plan 1A (the USISC preferred plan deferred by three years) costs $238.07M. Utilizing the USISC investment method, their preferred plan costs $200.1M (incremental investment with residuals) while Comsat's Plan 1A costs $167.4M. In both Comsat's "investment" analyses and the USISC "investment" analysis, Comsat's plan is cheaper. However, according to the USISC "use related" method, the USISC preferred plan is cheaper than Comsat's Plan 1A. (the USISC preferred plan cost is $208.1M and Comsat's Plan 1A is $222.2M).

4. Technological Risk

48. The carriers assessed the alternative plans with respect to the risks arising from utilizing a new technology. The major risks arising from plans which incorporate new technology are that: (a) the technology will not be available when required; and (b) the technology will not perform as specified. The USISCs state that any unforseen delay in the service date of the HAW-4/TPC-3 cable will not affect the customer because existing satellite capacity is sufficient to accommodate traffic growth up to 1991 and beyond. Thus, the USISCs see no technological risk associated with their preferred plan.

49. Comsat believes that the USISC plans are technologically risky. Unforeseen delay could arise because TAT-8, the first major transoceanic lightguide cable, is to be constructed and placed in operation in the North Atlantic in 1988, the same year as the proposed HAW-4/TPC-3 cable. If a problem is uncovered during the construction, testing or implementation of TAT-8 necessitating a delay in the service date of that cable, such a delay would affect the design, construction, price and service date of the HAW-4/TPC-3 cable as well. Comsat also notes that the lightguide cable

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[31] Residuals are cost allocated to facilities beyond the end of the planning period (i.e. - after 1995).

proposed for the POR spans more nautical miles than TAT-8. Comsat thus suggests that a delay until 1991 would permit the co-owners to gain important service, design and construction experience.

50. Comsat sees no technological risk associated with the deployment of INTELSAT V, V-A, VI or follow-on spacecraft in the region in 1991. Comsat states that modifications in the INTELSAT VI follow-on program currently under consideration are relatively simple extensions of current technology and should not interfere with the timely delivery of modified spacecraft to the region. According to Comsat, the INTELSAT VI program is continuing on schedule calling for the availability of two INTELSAT VI's in late 1986/early 1987 in the North Atlantic. Launch vehicle availability for the first three INTELSAT VI spacecraft is also assured. Negotiations are currently underway for the launch of the fourth and fifth INTELSAT VI spacecraft. Comsat believes there is no reason to question the viability of the new technologies associated with the INTELSAT VI: dynamic satellite switch and a high performance multibeam antenna.

5. Correspondent Acceptance (International Comity)

51. Correspondent acceptance is a factor which has traditionally been taken into account in the planning process when evaluating alternative plans. The USISCs emphasize that they have been involved in a planning effort with their foreign correspondents in the POR for the past several years and that this effort has included the periodic updating of traffic forecasts, the review of available technology and cost elements, and the analysis and evaluation of facility alternatives which would satisfy traffic demand in a timely and economic manner. The USISC pleadings recount in detail the various meetings, the development of various plans and the analysis that these plans have received by all interested parties and administrations. The USISCs state that the two plans they have submitted (particularly their preferred plan) are the ones that were found to be acceptable to their foreign correspondents. The USISCs generally conclude that international comity is an important factor and that the results of a negotiated process should be given substantial consideration.

52. Comsat states that our foreign correspondents have individual interests in expanding the cable network and avers that correspondent acceptance cannot be the sole basis for either eliminating plans or selecting a preferred facilities plan. Comsat argues that this is an internal U.S. proceeding and that we must evaluate facilities authorization from the perspective of the U.S. ratepayer. Comsat further states that there is no information to indicate that the foreign correspondents have been able to consider delaying the lightguide system by three years.

6. Evaluation by DoD, NTIA and Simplex

53. DoD, NTIA and Simplex filed comments relating to the particular plans. Both NTIA and DoD support AT&T's Plan II-A (Mod. 4) which introduces a fiber optic TPC-3 cable in 1988 that is routed through Guam via an underwater branch. DoD believes that this plan best meets the defense and security interests of the United States. NTIA also supports a Guam landing point for defense and commercial reasons. NTIA further believes that the need for competition between the cable and satellite media outweighs any short run overcapacity which may develop; that delay in implementing a fiber optic cable plan will give foreign manufacturers the opportunity to produce a greater number of fiber optic cables and improve their competitive position; and that by deferring the cable until 1991, competitive incentives for lowering satellite rates will be deferred.

54. Simplex Wire and Cable Company, a cable manufacturer, also supports the AT&T preferred plan. Simplex avers that the protection of U.S. ratepayers' interests demands that indirect pressures be brought to bear on INTELSAT to assure that in the future its construction program is more moderate and prudent. Simplex believes that to delay cable construction in the Pacific to help bail INTELSAT out of its substantial excess capacity problem can only have the effect of encouraging INTELSAT's continued overly optimistic construction plans. Thus, a U.S. decision to implement a new fiber optic system by 1988 would send a clear signal that INTELSAT must become more cost and demand conscious in its construction plans.

55. NTIA also proposed that we initiate consideration of a new loading methodology which would be characterized by greater reliance on market forces. It stated that such a policy would promote both cable and satellite technologies, increase intermodal competition and encourage the efficient provision of international telecommunications services. Under the broad NTIA approach, which would apply only to incremental or growth traffic, the facilities which are shown to be the most cost effective on a per circuit basis would receive a proportionally greater share of the traffic. Calculations would be made periodically and traffic would be allocated between the two mediums accordingly.

V. Discussion

56. We shall evaluate the alternative plans in terms of the traditional five criteria discussed above and used by the parties in their evaluation of the plans. We shall also assess these plans in terms of other factors such as the promotion of a new technology and U.S. industrial capability, augmenting intermodal and intramodal competition, and defense and commercial considerations. We shall also address the questions raised in

the comments to our NOI such as the need for a Master Plan for facilities utilization and the bifurcation of this phase of the process to include only those facilities to be utilized until 1991. We shall then issue tentative findings and request additional information from the parties. While we tentatively conclude here that a fiber optic TPC-3 as early as 1988 will be in the public interest and that this cable should reflect the Plan II-A (Mod. 4) configuration, we emphasize that this is only a tentative decision reached after weighing all the relevant factors. As the following discussion and analysis indicates, most but not all relevant factors favor a fiber optic cable as early as 1988.

A. Forecasted Demand, Capacity and Demand Flexibility

57. Traditionally, demand forecasts drive the entire planning process and establish the parameters of viable facilities alternatives. The demand forecast determines the capacity needed and the time period in which facilities that provide that capacity must be introduced into the region. It appears from the filings of the parties that total capacity exceeds demand without a TPC-3 cable through the use of existing cables and already procured satellites at least until 1991. If we look at overall capacity for U.S./Hawaii to Pacific Basin countries, there is little question that satellites committed to the region for East-West traffic when equipped with circuit multiplication techniques can handle the projected traffic and any unanticipated increase in traffic volume without the introduction of a lightguide cable system until at least 1991. The capacity of the INTELSAT V-A primary satellite transponders used for U.S./Hawaii to Pacific Basin countries in 1989 utilizing TDMA/DSI is 8910 circuits,[32] more than enough capacity to accommodate total demand and provide for demand flexibility. If INTELSAT deploys an "extra" INTELSAT V-A satellite into the POR as a major path satellite, as it is now scheduled to do, then total capacity will increase substantially to about 17,500 circuits while demand, according to the submitted forecasts, remains constant at 7965 circuits. Even AT&T acknowledges that if all Pacific traffic were to be placed on satellites, assuming a major path satellite in 1987, including the offloading of all existing cables, satellite utilization would never exceed 36% through 1991.

58. However, the question of whether demand exists for a lightguide system in 1988 depends on how much importance is attached to overall gross capacity in the POR as opposed to replacing saturated and expired cable systems with new cable systems. TPC-1 and TPC-2 circuits providing voice service are currently saturated and several major cables in the region will reach the end of their design life during the planning

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[32] The capacity of the INTELSAT V-A satellite allocated for U.S./Hawaii to Pacific Basin countries without the utilization of circuit multiplication techniques is 4350 circuits.

period. All new growth in the region is being carried on satellite with 70% of services provided over satellite at this time. This figure will only increase over the next several years. The cable systems proposed by the USISCs will replace these saturated and expired cables in the region so that new growth could be placed on cables as well as on satellites.

59. Thus, we reach two tentative findings as to whether demand exists for a lightguide cable system. First, we tentatively find that projected gross capacity in the region without TPC-3 substantially exceeds demand at least until 1991 and provides for adequate demand flexibility. Second, we tentatively find that a dearth of cable capacity currently exists in the POR. However, since satellite and cable facilities are generally fungible, we tentatively conclude that purely on a demand analysis the TPC-3 cable could be deferred until at least 1991.

B. Introduction of a New Technology

60. One of the goals of the planning processes in general has been the promotion of new technologies, both cable and satellite.[33] The introduction of a lightguide cable system in the region in 1988 means the introduction of digital fiber optic technology with its attendant service benefits. A lightguide cable system in the POR will become an integral part of a globally interconnected digital network. With the authorization of the first transatlantic fiber optic cable in May, 1984 (TAT-8), we have begun the move toward an era of fiber optic cable systems in all regions of the world. Fiber optic cable circuits may be cheaper and can provide more and different services than the traditional analog cables. For example, a digital fiber optic system has low noise levels, low data error rates and can provide services previously provided only by satellite such as wideband data and video services.[34] By accommodating these new services, international digital capability will spur the development of domestic digital systems in all the POR countries interconnected by this lightguide system as well as in countries in other regions of the world. The development and demand for these new digital services could stimulate circuit demand beyond that projected in the traffic forecasts submitted by the USISCs. Consideration of this factor would support the introduction of a fiber optic TPC-3 cable at the earliest practical date, i.e., 1988.

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[33] In Docket No. 18875, we released a Statement of Policies and Guidelines which set forth general policies in our licensing of facilities in the North Atlantic. These guidelines have also been applied to our planning processes in the Pacific and Caribbean regions. The first guideline states that "the public interest requires that we promote the continued development of both cable and satellite technologies and their most effective and timely applications to meet future requirements for international communications services." *See* Overseas Communications, 30 FCC 2d 571 (1971).

[34] *See,* Policies for Overseas Common Carriers, 84 FCC 2d 760, 766-768 (1981).

C. Intermodal and Intramodal Competition

61. We believe that the lower circuit costs of a lightguide cable system relative to conventional analog systems will exert a beneficial pressure on INTELSAT to be more cost conscious in its construction plans and to continue its efforts to shape its service offerings to meet user requirements. Thus, within certain parameters which recognize existing biases in facility selection and the lead times necessary to deploy new facilities, we tentatively conclude that introduction and use of a fiber optic TPC-3 in 1988 will promote intermodal competition. To the extent that carriers prefer cables to satellite, for operational or other reasons, we tentatively conclude that a fiber optic TPC-3 will also promote intramodal competition. That is, carriers employing cable technology will have additional capacity over which they may provide competing services.

D. Service Quality

62. We tentatively find that the plans submitted by the USISCs for a 1988 fiber optic cable are more advantageous from a service reliability standpoint than Comsat's plans to defer the cables until 1991. Furthermore, we believe that the USISC preferred plan (Plan II-A (Mod. 4)) is more advantageous from a service reliability standpoint than the USISC Plan III Modified. This is particularly true with respect to its restoration capabilities. Our tentative findings on these issues are discussed in detail below.

63. *Path Diversity.* Path diversity is obtained through the use of a number of independent routes to carry traffic to a given correspondent. Path diversity is closely related to the ability of a facility to restore circuits in case of a facilities failure. From an operational perspective, if any one path fails it is desirable to have additional paths available to provide routing options and prevent loss of service. At the present time there are two (primary and operational spare/major path) satellites and three cables (TPC 1 and 2 and ANZCAN) providing east-west service in the POR. While we would not characterize this arrangement as deficient, it is clear that another cable, particularly one with a ring configuration and substantial capacity, would augment path diversity. Thus, path diversity is enhanced by the USISCs proposal to introduce lightguide cables in 1988 and maximized by the construction of Plan IIA (Mod. 4).

64 *Restoration.* The ability to maintain service in case of a facilities outage is crucial to the success of any facilities plan. We are presented with two questions regarding the restoration abilities of the facilities alternatives presented. The first question is whether a fiber optic TPC-3 would enhance the restoration of existing facilities. The answer to this question is clearly "yes". A TPC-3 would be able to restore TPC-1 and TPC-2 traffic. Further, digital cables such as TPC-3 have the ability to

restore satellite services, although the coverage is geographically limited. Depending on traffic flows within the region and on TPC-3, it would appear that the Plan IIA (Mod. 4) ring configuration would provide better restoration capabilities than the non-ring Plan III Modified configuration.

65. The second question relates to how a fiber optic TPC-3 would be restored. It would appear that Plan III Modified, the non-ring proposal, would be restored entirely by satellite while restoration of Plan IIA (Mod. 4) would be provided by satellite (east of the branching unit) and the TPC-3 cable or satellite (west of the branching unit). We can therefore tentatively conclude that the introduction of a fiber optic TPC-3 would enhance the restoration options available in the POR for existing facilities. We can also tentatively conclude that a ring design which permits partial self-restoration provides an additional restoration option although 100% satellite restoration of either alternative would be satisfactory. However, we shall require the USISCs in their comments to this FNPRM to present specific plans as to how TPC-3 (both plans) would be restored. We are particularly concerned whether satellite restoration via the POR Spare satellite will be employed, in part or in whole, or whether the carriers anticipate a fourth transpacific cable. In other words, will a future TPC-4 be substantially justified or restoration grounds?

66. *Media Diversity.* A dearth of cable capacity exists in the region and approximately 70% of all POR traffic including all new growth is currently routed over satellite. Under the USISC plans, these percentages would eventually be reversed so that a greater percentage of all traffic in the region would be routed over cable. While we take no position here on whether any particular cable/satellite ratio is desirable, we do believe that media diversity would be generally enhanced by the introduction of a fiber optic TPC-3. This is particularly so because, for the first time, users of high speed data and other wideband services in the PCR would have the option of using cable.

67. *Loading.* Comsat and the USISCs used different loading approaches in analyzing their plans. AT&T and the other USISCs used a loading approach bilaterally negotiated with their foreign correspondents, while Comsat used a traditional balanced loading approach. In our *Report and Order* in the first phase of the process, we found a Master Plan for circuit activation proposed by AT&T and Comsat reasonable.[35] This Master Plan governs the activation of circuits form 1982–1986 and is based upon the principle of balanced loading.

68. We are now faced with deciding how to efficiently utilize facilities for the 1987–1995 period. As competition develops internationally we hope

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[35] Although we found this plan reasonable, we did not authorize a specific Master Plan because we believed it would frustrate our decision to rely upon the carriers and market forces to efficiently activate circuits.

to move away from specifying any loading criteria. However, we are not yet at a point where we can totally rely on market forces to govern circuit activation decisions. Until such time that effective carrier and facility competition exists, we still must monitor circuit activation decisions to assure that both media are reasonably used. We also believe that the carriers who invest in this cable system have the right to know under what criteria it will be loaded, if any. The same holds true for those who will plan and invest in the next INTELSAT series of satellites. For this reason, we support the notion of a Master Plan as a useful means of arraying projected circuit requirements. A Master Plan also assists us in monitoring the international market in facilities planning and in considering Section 214 applications.

69. In considering what loading criteria shall be used in the POR, we note that several options exist. Balanced loading could be continued. Loading could be left up to the USISCs and their foreign correspondents. A phased-in plan, moving away from balanced loading, with yearly or planning period caps could also be developed.[36] Since the parties analyzed their plans using different loading approaches, we will require the USISCs to submit more detailed information regarding their loading preferences. We would also like the parties to submit other loading options for our consideration.[37] We also request that the parties submit a master plan with each loading option for our consideration. Finally, we specifically request interested parties to comment on NTIA's broad proposal. This proposal attempts to simulate a market free from existing facility biases and to eventually lessen the need for government involvement in facilities planning. To this extent we find it to be a useful proposal. On the other hand, this proposal may require continued Commission involvement in loading activities as the arbiter of formula/cost disagreements and may not be well received by our carriers' foreign correspondents.[38] We shall reach no tentative conclusion on loading, although we shall require the carriers to submit forecasts and AT&T to submit distribution for the two major facility options for both 1988 and 1991.[39] However, we will look favorably on those options which move

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[36] *See* Joint submission of AT&T and Comsat to the North Atlantic Consultative Working Group meeting. CC Docket 79-184, January, 1985.

[37] We are currently involved in an investigation of future loading policies in the North Atlantic. Parties have submitted a series of loading options in that docket for our consideration. *See* CC Docket 79-184.

[38] We note NTIA's general proposal was not particularly favored by European administrations at the recent North Atlantic Consultative Working Group meeting in Orlando, Florida, in January, 1985.

[39] Carriers should analyze the circuit methodologies they submit in terms of: (a) their cost to users; (b) effect on service quality; (c) the predicability of circuit distribution in the event actual circuit demand varies from the level forecast; and (d) the cost to users and

away from a rigid methodology and rely on market forces while recognizing the existing realities of the market place.[40]

E. Cost Analysis

70. The number of different cost estimates supplied by AT&T and Comsat, and the range over which these estimates vary, reflect unresolved methodology controversies concerning the appropriate way to measure cost. In addition, comments filed on behalf of the State of Hawaii suggest use of yet another method for comparing the costs of the alternative plans.

71. One of the major differences in approach is the method used to measure the cost of satellite facilities to be incorporated in the plans. AT&T uses two methods to estimate satellite costs: a use related approach, which estimates annual Comsat lease (tariff) rate charges for the use of international satellite circuits; and an investment related method, which allocates a portion of the total investment and operating cost for satellite facilities to the Pacific region plans.

72. Comsat's cost analysis uses investment and operating costs for new cable and satellite facilities to compare the costs of the alternative plans. Comsat defines as new satellite facilities only those satellites for which INTELSAT has not made a final investment commitment. The costs associated with all other satellites are treated as sunk costs and not included in Comsat's cost analysis.

73. None of these methodologies accurately reflects costs. First, Comsat views the INTELSAT VI satellites being the first satellites projected for use in the Pacific Ocean region for which INTELSAT has not made a final investment decision and thus the only satellite the cost of which would be computed into its costing equation. However, other satellites (INTELSAT V and VA) will be used in the region. Second, AT&T's investment based cost analysis uses investment and operating costs for new cable and satellite facilities to compare the costs of the alternative plans. In so doing, AT&T accounts for the fact that Comsat's

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the effect on service quality in the event actual circuit demand varies from the level forecast. The results of the analyses of their preferred distribution methodology should be compared with that for the balanced loading circuit distribution they submit.

[40] While we have not yet received these options, we would anticipate continuing the existing exemption from any methodology for providers of record services and extending this exemption to new entrants as well as IMTS providers other than AT&T. Thus, any methodology might apply only to AT&T's provision of IMTS. New entrants and IMTS providers other than AT&T use relatively few circuits and total flexibility would facilitate their economic provision of service. As to record service providers, we note that the vast majority of their circuits are used for private line service (a service where users generally select the medium), several carriers now compete for customers, and, again relatively few circuits are involved. Thus, it is arguable that market forces already determine loading for these services and carriers.

investment in INTELSAT satellites varies with use by including an allocated portion of the investment and operating costs for all INTELSAT satellites used in the Pacific Ocean region during the planning period. While including all satellites used in the POR during the planning period may be appropriate, AT&T allocates Comsat's share of the costs of these facilities according to Comsat's regional use. This results in a higher figure than if just Comsat's overall percentage of ownership in the INTELSAT system is used.

74. Third, AT&T's use related cost analysis also uses the investment and operating costs of new cable facilities to compare cost of the alternative plans. However, AT&T uses its projections of Comsat's future tariff charges to the U.S. carriers for lease of satellite circuits as the measure of satellite costs for the plans. Use of projected Comsat tariff charges is based on the fact that it is these costs which carriers must pay for service. This method has a fundamental inconsistency in that it compares investment and operating costs for new cable facilities (which does not include return on investment or taxes for cable facilities) with Comsat's tariff rates (which does include return on investment and taxes). Thus, AT&T's approach may make satellite use appear more costly in relation to cable use. Fourth, neither AT&T nor Comsat has attempted to take into consideration the costs of terrestrial hauls or transiting facilities.[41]

75. The State of Hawaii asserts that cost comparisons of the alternative plans should be based on revenue requirements at a stated rate of return for both cables and satellite facilities. Such cost comparisons would include revenue requirements for both existing and new facilities. Under this analysis, the most important factors are facility costs and forecasted demand and a facility would not be constructed (and a revenue requirement not increased) unless a proposed facility was required to meet demand requirements.

76. There is no question that TPC-3 is an expensive facility and that deferral would delay an increase to AT&T's rate base. Comsat calculates that a three year deferral would save ratepayers $120 million while the USISC cost estimates show a savings of $33 million for a similar deferral. Because there is no agreement as to a costing methodology, and because we have never prescribed a particular methodology, we can reach no tentative conclusion as to exactly how much ratepayers would save by a deferral of TPC-3. In this regard, the State of Hawaii's approach has a certain appeal: forget past investments as simply sunk and look only to

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[41] AT&T indicates that it did not include taxes or the effects of inflation in its projection of future Comsat tariff charges. Additionally, Comsat's recent unbundling of its tariff and estimates on cost overruns for both cables and satellites would also impact a cost comparison.

revenue requirements which ratepayers must support. Using any approach, however, we can tentatively conclude that deferral would delay an increase in the overall (Comsat plus AT&T) rate base that users must support. Thus, deferral would, under a rate base regulation approach, lead to lower international rates for users. Of course, the savings of any deferral would partially be offset by the continued ownership expenses of several hundred circuits in the ANZCAN North cable between Hawaii and Canada.[42] We estimate these expenses to approximately $11 million dollars per year. Additionally, the savings of any deferral would be partially offset by transiting fees paid by foreign administrations employing the domestic facilities of U.S. carriers to carry traffic to or from TPC-3.

F. Technological Risk

77. The plans proposed by the USISCs and Comsat both introduce a new technology into the region. The USISC plans provide for the introduction of a lightguide cable system in 1988 and an INTELSAT VI series satellite in 1991. Comsat's plans provide for both these new systems to be introduced in 1991. The question that we must consider is whether the introduction of these new technologies in the region presents a risk to continuation of service if the technology is not available when required or if the technology will not perform as specified.

78. We believe, based on the record before us, that service to the customer will not be interrupted regardless of the plan chosen because of the amount of existing satellite capacity present in all of the proposed plans. The satellite capacity to be deployed beginning in 1986 can provide service in the region even if the lightguide cable system were delayed for more than three years or if the system did not perform as expected. The INTELSAT VI satellite planned for introduction in the POR in the early 1990's will be introduced in other regions of the world at earlier dates so that any problems associated with the new technologies it offers should be ironed out before its introduction in the POR. On the other hand, a delay in the TPC-3 would enable the owners to gain what could be valuable experience from TAT-8's introduction in 1988. Additionally, as frequently occurs with a new technology, a delay could result in a lower price to carriers and a lower revenue requirement to users. Thus, while we tentatively find that none of the proposed plans poses a technological risk to the continuation of service, we note that deferral of TPC-3 does have some potential benefits.

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[42] Traditionally, investments are placed in a carrier's ratebase pursuant to our uniform system of accounts. In view of the relationship here between forecasted demand and cost, interested parties may wish to comment on the appropriateness of the carriers phasing their investment in TPC-3 into their ratebases over a specific period of time, perhaps two or three years.

G. Correspondent Acceptance

79. International comity is a factor which should and must be taken into account when assessing facility plans submitted in the planning process. Although international comity must be balanced against our public interest mandate, it would be short-sighted to view U.S. participation in any cable system without taking into account the effect our decision will have on relations with international telecommunications entities in the region. Although there have been no Consultative meetings similar to the multilateral carrier/government meetings held in conjunction with North Atlantic facilities planning, it appears that various alternatives have been subjected to long and extensive analysis by both the USISCs and their foreign correspondents. A TPC-3 in 1988 as described in Plan IIA (Mod. 4) was found to be preferable by the USISCs and their foreign correspondents. It appears that our foreign correspondents are also very anxious to implement the new digital technology as soon as possible. The record before us gives no indication as to whether any support exists among our foreign correspondents for delaying the construction of the cable system until 1991. We tentatively find, therefore, that the USISC Plan II-A (Mod-4) is the plan preferred by our foreign correspondents and that international comity would be furthered by the construction of this cable as early as 1988.

H. Other Issues

80. *National Defense Security and Commercial Considerations.* DoD desires that for defense and security considerations, a fiber optic cable system routed through Guam be constructed in 1988. NTIA emphasizes both national security and commercial reasons for constructing such a system in 1988. Although not reason alone to support a particular facilities alternative, we must give national security considerations weight in arriving at a facilities plan.[43] Thus, from the perspective of DoD and NTIA, the USISC Plan II-A (Mod. 4) which is routed through Guam is the preferred alternative. However, we must note that a Guam landing point necessitates the expenditure of approximately 67 million additional dollars. In view of the small number of circuits that DoD requires to Guam, we must inquire as to whether it is appropriate for the general ratepayer to subsidize service to Guam.[44] Parties are asked to comment on whether construction of the Guam route will result in an unnecessary burden on ratepayers and, if so, whether the burden is justified by national security considerations. Parties may also wish to

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[43] *See* National Security Decision Directive 97, National Security Telecommunications Policy.

[44] *See* Communications Satellite Corporation, 80 FCC 2d 170, 180 (1980), and 97 FCC 2d 82 (1984).

comment on whether a special rate designed to recover the cost of the Guam route should be imposed as a condition on the cable authorization.

81. *Further Bifurcation of the Process.* In their comments and reply comments to the NOI, Comsat, GTE and ITT proposed that we should only consider facilities that are to be deployed from 1987-1991. However, these parties state that forecasts should be submitted through 1995. The parties believe that insufficient information exists to recommend facilities beyond 1991. AT&T believes that the record is sufficient for this proceeding to cover facilities through 1995. We find that the plans and traffic forecasts submitted by the parties are comprehensive and give us sufficient information to recommend facilities alternatives for the entire planning period. Thus, we tentatively conclude that Phase II of the process shall include facilities to be deployed for the 1987–1995 time period and that the facilities discussed herein, the INTELSAT V, V-A and VI satellites and a fiber optic TPC-3, are the appropriate facilities for the POR for the 1987–1995 time period.

82. *U.S. Industrial Capability.* NTIA espouses the view that if the cable plan is implemented in 1988, U.S. firms would be in an excellent position to construct at least 50% of the TPC-3 cable and construct a large share of the other cables extending the system to Far East points. Delay, according to NTIA, could compromise the lead of the U.S. in the international telecommunications industry. NTIA's point is a valid one to the extent that portions of the cable system would be put out for bids. However, to the extent that the construction of the cable system is a negotiated arrangement between U.S. firms and their foreign correspondents, this view would not be entirely correct.

83. The recently initialled draft Construction and Maintenance Agreement reflects a negotiated construction agreement. Pursuant to this draft agreement, U.S. companies will construct the HAW-4 cable (2246 miles) as well as the portion of TPC-3 from Hawaii to the branching unit (2869 miles). Japan, through KDD, will construct the branching unit as well as the branches to Guam (833 miles) and Japan (1201 miles). The remaining cables in the TPC-3 system have not yet been procured. The total length of the cable system contracted for is therefore 7149 miles, of which 5115 miles (71.5%) will be constructed by U.S. companies. The construction contract is allocated by approximately the same percentages: 72.5% ($430 million of $593 million total) allocated to U.S. firms and 29.5% ($163 million) allocated to KDD. These percentages are comparable to those derived for TAT-8 and do substantially exceed 50%. Although we cannot predict what a negotiated contract would look like if TPC-3 were to be delayed, we tentatively conclude that the present arrangement is of considerable value and importance to U.S. manufacturers.

VI. Summary and Tentative Conclusions

84. Although overall gross capacity exceeds demand in the POR without the introduction of a lightguide cable system at least until 1991, and although any TPC is an expensive undertaking, there are several counterveiling considerations favoring introduction of a cable system in 1988. First, although excess satellite capacity exists throughout the time period, cable circuits providing voice service to all major markets with the exception of U.S.-Australia, New Zealand and Fiji are currently saturated. Second, the introduction of a lightguide cable system in the region in 1988 means the introduction of digital fiber optic technology with its attendant service benefits. Fiber optic cable circuits can provide services that could previously be provided only over satellite. Third, service quality, correspondent acceptance, U.S. industrial interests, the promotion of intermodal and intramodal competition, and national security considerations all argue for a 1988 fiber optic TPC-3. Further, the factors of service quality, correspondent acceptance and national security argue for Plan IIA (Mod. 4) and appear to outweigh the lower cost of Plan III Modified. For these reasons we tentatively conclude that a lightguide cable system should be constructed in 1988 and should reflect the configuration found in Plan IIA (Mod. 4).

85. We request interested parties to comment on our various tentative conclusions and the alternatives considered by us in reaching these tentative conclusions. We also request interested parties to provide the additional information requested herein and any other data or views which they deem useful to our deliberations.

86. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contracts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-file written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission

official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's rules, 47 C.F.R. §1.1231.

VI. Ordering Clauses

87. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 214 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 214 and 403 (1970), and pursuant to Section 201(c) of the Communications Satellite Act of 1962, as amended, 47 U.S.C. §721(c)(1970), that a rulemaking looking toward development of the policy we shall apply in acting upon applications by the United States international service carriers and the Communications Satellite Corporation for authorization to construct and operate new cable and satellite transmission facilities to meet traffic demands in the Pacific Ocean region during the 1987–1995 period is hereby instituted.

88. IT IS FURTHER ORDERED that:

A. Updated country-by-country traffic forecasts for the Pacific Ocean Region for the period 1987–1995 shall be filed by all carriers on April 12, 1985;

B. AT&T shall file four circuit distributions based on the balanced loading methodology and on the circuit distributions negotiated with its correspondents for Plan II-A (Mod. 4) and Plan III Modified on April 22, 1985 assuming Plan II-A (Mod. 4) and Plan III Modified in 1988 as well as in 1991;

C. Any other interested party may file proposed circuit distributions for Plan II-A (Mod.-4) and Plan III Modified on April 22, 1985;

D. Interested persons may file analyses of the submitted circuit distributions and comments on the tentative conclusions reached herein on May 6, 1985; and

E. Reply Comments shall be filed on May 17, 1985.

In reaching its decisions, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

89. IT IS HEREBY CERTIFIED, pursuant to Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*, that Section 603 and 604 of that Act do not apply to this rulemaking since the proposed rules, if promulgated, will not have a significant economic impact on a substantial number of small entities. The primary economic impact of these rules, if

promulgated, will be on the U.S. international carriers and the Communications Satellite Corporation.

90. IT IS FURTHER ORDERED that the Secretary shall provide a copy of the above certification and statement to the Chief Counsel for Advocacy of the Small Business Administration and shall cause said certification and statement to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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*Appendix A-may be seen in the FCC's Dockets Branch, 1919 M Street, N.W., Wash., D.C.

Primer, Political B/ing
Primer, Political Cablecasting

This Primer is a Commission staff update of the 1978 Public Notice and Primer and contains significant rulings issued by the Commission since 1978. Material which was overruled or superseded has been deleted.

Political Primer 1984

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Part I. Introduction

Purpose of Primer

1. The FCC has prepared this booklet to inform you of the law on broadcasts and cablecasts by candidates for public office. The booklet, which we call the Primer, also includes the Commission's most important rulings and statements of policy on political broadcasting. In most cases, specific examples are given of how the law and the rules apply—sometimes in question and answer form—so as to make the Primer as understandable as possible. In this discussion of most questions in Part II, you will see citations to FCC rulings or court decisions so that you can review the full text of the ruling or decision if you wish to do so.*

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* This Primer serves as an accurate restatement of existing rules and precedent. The Commission's decisions summarized in this document were reached in specific factual contexts, and may contain concurring and dissenting views. Any reader having questions

The Primer is organized according to subject matter so that the questions and answers about each aspect of political broadcasting are together. When necessary, cross references are made to other parts of the Primer. Unlike former editions, the Primer has an index.

The Primer cites only current interpretations of the law. Unlike former Primers, it omits old decisions that have been overruled, because citing them would tend to confuse the reader. On the other hand, this Primer includes many new rulings issued by the Commission since the last edition was published.

All Political Laws and Rules Covered

2. This Primer tries to deal with all laws, rules and policies about political broadcasting. This includes not only "equal time" and "censorship," but "reasonable access" for candidates for Federal office, the rates that may be charged candidates for time, the Fairness Doctrine as it applies to political campaigns, the personal attack and political editorializing rules, and the rules on sponsorship identification, logging of broadcasts and keeping a public file as they apply to broadcasts and cablecasts by or about political candidates.

Some Federal laws on political elections are not administered by this Commission, but rather by the Federal Election Commission. Even though our agency does not administer these laws, we have included short discussions of two of them in this Primer for your information.

How the Primer is Organized

3. Part I of the Primer is entitled "Introduction." It includes the preceding introductory passages as well as an explanation of the importance of political broadcasting, instructions on where and how to file complaints and inquiries, and the text of the sections of the Communications Act of 1934 that govern political broadcasting and cablecasting.

Part II gives examples of how the law has been applied to specific situations. It also gives citations to the FCC rulings and court decisions that are the authority for the statements of law made in that Section.

The Appendix contains the Commission Rules and Regulations interpreting and administering the sections of the Communications Act that apply to political broadcasting and cablecasting.

Finally, there is a key word index we hope will enable you to find the answers to your questions quickly.

The Importance of Political Broadcasting

4. Congress has recognized the great importance of political broadcasting by passing laws which establish stricter standards for this type of broadcast and cablecast than for any other. Most of these are in Section 315 of the Communications Act which requires "equal opportunities" for candidates, forbids censorship of what they say, and puts a ceiling on the amounts that stations and cable systems may charge them for time. Another section of the Communications Act dealing with political broadcasts, 312(a)(7), requires stations to give or sell "reasonable access" to candidates for Federal elective office.

The U.S. Supreme Court also has recognized the great importance to the public of political broadcasts in more than one decision. For example, it held that since Section 315 forbids a station to censor a candidate's broadcasts and since stations should not be discouraged from carrying these broadcasts, a station was not subject to libel suits for anything that a candidate might broadcast. *Farmers Educational and Cooperative Union v. WDAY, Inc.*, 360 U.S. 525 (1959).

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about the interpretations set forth in this Primer should examine the text of the specific case(s) cited.

The FCC itself has stressed the importance of political broadcasting many times. In one statement, it said:

> In short, the presentation of political broadcasting, while only one of the many elements of service to the public . . . is an important facet, deserving the licensee's closest attention, because of the contribution broadcasting can thus make to an informed electorate—in turn so vital to the proper functioning of our Republic. *Licensee Responsibility as to Political Broadcasts,* 15 FCC 2d 94 (1968).

Because of the importance of political broadcasts, the Mass Media Bureau and the Office of General Counsel have been given joint responsibility in connection with the issuance of rulings in the broadcasting field under authority delegated to them by the Commission, and the making of recommendations to the Commission itself on the major cases which go to it for decisions rather than to the staff. Complaints and inquiries about political broadcasting and cablecasting are given special priority by the Commission so that rulings can be made on all complaints in time to put the rulings into effect before election day.

Where to Send Complaints and Inquiries

5. Although we have tried to cover the most important, difficult and frequently asked questions about the laws on political broadcasts and cablecasts in this Primer, each day usually brings at least one new question of interpretation. If you have a question about the law on political broadcasts or cablecasts and cannot find the answer in this Primer, or if you have a complaint on this subject, write to:

Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau
Washington, D. C. 20554

If time is short and does not permit use of the mails, you can obtain an oral staff opinion or ruling by placing a telephone call to (202) 632-7586, the Fairness/Political Programming Branch of the Enforcement Division.

How To File a Complaint

6. No special form is needed for filing complaints about political broadcasting or cablecasting. However, in order to speed up our handling of complaints, we recommend that you follow these steps:

(1) Before complaining to the Commission, complain to the station or cable operator that you believe has denied you your legal rights. We encourage negotiation between candidates and stations or cable operators and have found that many disputes can be settled in that way, without our intervening.

(2) When you do file a complaint with the Commission, send a copy to the station or cable operator at the same time.

(3) The complainant and the station or cable operator should continue to send copies to each other of all correspondence between them and the Commission, thus saving time in settling the complaint.

(4) Unless it is within the last few days before an election so that a written complaint might arrive too late to be acted upon, send your complaint in writing. It should contain (i) the name, address and telephone number of the complainant; (ii) the call letters (or name) and location (city and State) of the stations or cable operator, (iii) a detailed statement of the facts of the case, including the public office involved, the date and kind of election to be held (primary or general election), and whether the complainant and his opponent or opponents are legally qualified candidates for public

office under the laws of their State. When the complainant is seeking "equal opportunities," he or she should give the dates of prior broadcasts or cable originations, if any, by his or her opponents, the date on which a request for equal opportunities was made to the station or cable operator, and the reasons the station or cable operator gave for refusing the request. Where the complainant alleges denial of "lowest unit rate" or, if a candidate for federal office, denial of "reasonable access" the complainant should furnish all essential facts on which the complaint is based.

Sections 315 and 312(a)(7) of the Communications Act

7. Section 315 of the Communications Act of 1934, as amended, follows:

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*. That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any:

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—

(1) during the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof.

(c) For purposes of this section—

(1) the term "broadcasting station" includes a community antenna television system; and

(2) the terms "licensee" and "station licensee" when used with respect to a community antenna television system mean the operator of such system.

(d) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

Section 312(a)(7) of the Communications Act states:

(a) The Commission may revoke any station license or construction permit— . .

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

Part II. Detailed Explanation of Political Broadcasting and Cablecasting Law

Who is a "Legally Qualified Candidate for Public Office?"

8. Since Sections 315 and 312(a)(7) of the Communications Act apply only to legally qualified candidates for public office, it is important to understand how the Commission and the courts have defined this term. The Commission's rule states in substance, that a legally qualified candidate is a person who has publicly announced that he is a candidate *and* who meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate *and* who:

(1) Has qualified for a place on the ballot

or

(2) Has publicly committed himself to seeking election by the write-in method *and* is eligible under the applicable law to be voted for by sticker, by writing in his name on the ballot, or other method, *and* makes a substantial showing that he is a bona fide candidate for nomination or office. (See par. 6 below regarding "Candidates for Nomination by Convention.")

Note the "ands" and "ors" in the above language. For example, a mere announcement that he is a candidate does not make a person legally qualified for the purposes of our rules. He must also be eligible to hold the office he is seeking and either have qualified for a place on the ballot or have qualified, as explained in (2) above, as a write-in candidate. The Commission will look to the laws of the State in which the election is to be held to determine whether a person has qualified as a candidate, regardless of whether the election is for national, State, county or municipal office. Below are answers to the most frequently asked questions on this subject.

"Public Announcement" of Candidacy

9. A candidate may meet the "public announcement" requirement of the rules by simply stating publicly that he is a candidate for nomination or election to a certain office. Filing the necessary papers or obtaining the required certification under his State's laws in order to qualify for a place on the ballot is considered to be the equivalent of a public announcement of candidacy. However, a public announcement of candidacy will not be presumed to have been made merely because a person is "expected to run" or because some of his friends and associates are seeking support for him in the expectation that he will run. Problems in this area are most likely to arise when a nomination is by convention or caucus instead of by primary election, since a person may be nominated by a convention even if he has made no prior announcement of his candidacy. In one of its rulings on such a situation, the Commission found that President Lyndon B. Johnson was not a "legally qualified candidate for public office" for purposes of Section 315 at the time the TV networks broadcast an interview with him on December 7, 1967, because he had not publicly announced his intention to seek reelection. During the TV interview he refused to speculate about running for reelection and stated that he had not made his decision on the subject. The complainant in the case, who had publicly announced his intention to seek the Democratic Presidential nomination, requested "equal time," contending that he and President Johnson were opposing candidates for the nomination of their party. The Commission ruled that a person was not a legally qualified candidate within the meaning of the statute unless he had publicly announced his intention to be a candidate. The Commission stated that "In this area, there cannot simply be reference to applicable State law, which is the Commission's customary approach in local primary and general elections. . . ." It said that unless it held to its long-standing requirement of public announcement of candidacy, a chaotic situation would result. "For example, incumbents often are eligible to run again, and, prior to a determination to seek another term, they may take many preliminary steps of varying nature (e.g., frequent trips to the election State, with

speeches, conferences with financial sources and potential delegates). . . ." The Commission concluded that for it "to attempt to make findings on whether or when the incumbent has become a candidate during the usual, oft-repeated and varying preliminary period would render the statute unworkable. There would be a continual series of complex factual hearings, whose resolution . . . would be most difficult and indeed might remain stubbornly speculative."[1]

In a contrasting case, a person had announced his intention to seek the Democratic party nomination for Governor of New York, but claimed that Section 315 did not apply to him, even though his name could be placed on the primary ballot by any one of three different methods. The Commission ruled that since under one of the three methods the person could become the party's nominee if he received the majority of votes cast at a nominating session of the New York State Democratic Committee and had no opponents under the other methods, it was not unreasonable for the licensee of a station to decide that this person was now a legally qualified candidate for public office, since the Commission's rules state, among other things, that "a legally qualified candidate means any person who has publicly announced that he is a candidate for nomination by a convention of a political party. . . ."[2]

Who is Eligible to Hold Office?

10. A party's candidate for President was 31 years old and her Vice Presidential running mate was 21 years old. They had publicly announced their candidacies and their party stated that it had filed for ballot status in 15 States, had been certified in 6, and had collected nearly 500,000 signatures on nominating petitions. Were they legally qualified candidates for purposes of Sections 315 and 312 of the Act? No. Under the Commission's rules a person must meet "the qualifications prescribed by the applicable laws to hold the office for which he is a candidate" before he will be considered a legally qualified candidate. Article II, Section I, Clause 4 of the United States Constitution states, among other things, that no one is eligible to the Office of President "who shall not have attained the age of thirty-five years." Article II of the Constitution states that ". . . no person constitutionally ineligible to the Office of President shall be eligible to that of Vice President of the United States."[3]

11. A station asked whether it was required to sell time to members of the Communist Party who were running for the offices of President and Vice President, in light of the Smith Act.[4] The Commission replied that Section 312(a)(7) of the Communications Act requires licensees to give or sell reasonable amounts of time to candidates for Federal elective office, including Communist Party candidates if they are otherwise legally qualified to be candidates for the Federal office they seek. The Smith Act provides criminal penalties for individuals who actively advocate or seek to bring about the overthrow of the Government of the United States, but it does not specifically refer to the Communist Party, and the U.S. Supreme Court has ruled that the following language from 18 U.S.C. 783 is applicable to the provisions of the Smith Act:

> (f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or any other criminal statute.[5]

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[1] *Sen. Eugene J. McCarthy,* 11 FCC 2d 511, 512-13 (1968), *aff'd,* 390 F. 2d 471 (D.C. Cir. 1968); *see also, Anthony R. Martin-Trigona,* 67 FCC 2d 33 (1977); National Citizens Committee for Broadcasting *et al.,* 75 FCC 2d (FCC 79-440).

[2] *William Vanden Heuvel,* 23 FCC 2d 199(1970).

[3] *Socialist Workers Party,* 39 FCC 2d 89 (1972).

[4] 18 U.S.C. 2385.

[5] *Scales v. U.S.,* 365 U.S. 203 (1961); *Ken Bauder (Station WLUC-TV),* 62 FCC 2d 849 (1976).

Ballot and Write-In Candidates

12. A candidate need not always be on the ballot to be legally qualified. It depends on the laws of the State in which the election will take place. In some states persons may be voted for as write-in candidates if they have not complied with the requirements for getting their names on the ballot. In such States, if a person makes a public announcement that he or she is a write-in candidate for a certain office, is eligible to hold the office if elected, and makes a "substantial showing" that he is a bona fide candidate who is actively seeking election (such as by establishing campaign headquarters, making campaign speeches, issuing press releases, etc.),[6] he will be considered a legally qualified candidate within the meaning of Sections 315 and 312. A mere announcement that he is a write-in candidate, by itself, does not entitle him to equal opportunities or other rights of candidates under the Communications Act.[7] The laws of each State will determine whether on the facts of each case a candidate is entitled to a place on the ballot or, if he cannot qualify for ballot status, whether he may run as a write-in candidate. See rules quoted in the Appendix.

In one case, the Commission determined that a licensee did not act unreasonably in refusing to sell time to an alleged write-in candidate because he had not substantiated his claim that he was a legally qualified candidate at the time of his request. Rather, he merely furnished conclusions that he had engaged in campaign activities without supplying any specific information in this regard.[8]

Candidate Must Prove Qualifications

13. A candidate must prove that he is a legally qualified candidate in order to gain his rights under Sections 315 and 312(a)(7). Sections 73.1940 and 76.205 of the rules (47 CFR 73.1940 and 76.205) state that a candidate seeking equal opportunities has the burden of proving that he and his opponents are legally qualified candidates for the same public office. In one case, after qualifying for a place on the ballot for one office in a primary, a candidate notified State officials that he was withdrawing from that race, but later claimed that he had not intended to withdraw. However, the evidence indicated that he was actually supporting another candidate for that office and personally was now seeking nomination for a different office. The Commission ruled that he was not entitled to the rights of a candidate for the first office because he had not made a clear showing that he was now a legally qualified candidate for that office.[9] In another case, the Commission stated that "where initial doubt is present as to whether in fact a candidate is actually legally qualified for the office he seeks, then it is incumbent upon that candidate to prove his qualifications."[10]

Candidates for Nomination by Convention

14. Except for Presidential or Vice Presidential candidates, candidates for nomination by convention or caucus must (i) publicly announce their intention to run for nomination; (ii) be eligible to hold the office they are seeking, and (iii) make a substantial showing that they are bona fide candidates. No one except a Presidential or Vice Presidential candidate will be

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[6] *KGNS*, 40 FCC 291 (1952); *Socialist Labor Party of America*, 40 FCC 239 (1951). For a leading case in which a write-in candidate was held to have made a substantial showing that she was a bona fide candidate, see *Socialist Workers Party*, 26 FCC 2d 244 (1970).

[7] *See* 47 CFR 73, 1940 (a)(5) and 76.5(y)(5) for further information on "substantial showing."

[8] *Douglas S. Kraeger*, 87 FCC 2d 751 (1980).

[9] *Lar Daly*, 40 FCC 270 (1956).

[10] *American Vegetarian Party*, 40 FCC 278 (1956); see also *Socialist Workers Party*, 40 FCC 421 (1964); *Raymond Harold Smith*, 40 FCC 430 (1964); *Frank J. Kuhn, Jr.*, 48 FCC 2d 433 (1974); *Roy Anderson*, 14 FCC 2d 1064 (1968); aff'd per curiam, *Anderson* v. *Federal Communications Commission*, 403 F. 2d 61 (2d Cir. 1968).

considered a legally qualified candidate for nomination by convention or caucus earlier than 90 days before the convention or caucus is to begin.[11]

Candidates for Presidency and Vice Presidency

15. A special situation arises in connection with candidates for President and Vice President, since they are running nationwide. Candidates for *nomination* to either of these offices must (i) make a public announcement of candidacy; (ii) be eligible to hold the office under the Constitution and other applicable laws and (iii) either the candidates or their proposed delegates must have qualified for the primary or Presidential preference ballot in the State in which they are running *or* have made a substantial showing of bona fide candidacy in that State, territory or the District of Columbia. Persons will be considered legally qualified candidates for nomination only in the State or States in which they qualify under the above standard, unless they qualify in 10 or more States (or 9 and the District of Columbia), in which event they will be considered legally qualified candidates for nomination in all States, territories and the District of Columbia.[12] Candidates for *election* to the Presidency or Vice Presidency must qualify in the same way as candidates for other offices; that is, make a public announcement of their candidacies, be eligible to hold the offices sought and either qualify for a place on the ballot in the States in which they qualify as candidates, or qualify as write-in candidates by committing themselves to seeking election by that method and making a substantial showing that they are bona fide candidates for election. Like candidates for Presidential or Vice Presidential nomination, they will be considered legally qualified candidates only in the States in which they have met these requirements unless they meet the requirements in 10 or more States (or 9 and the District of Columbia) in which event they will be considered legally qualified candidates in all States, territories and the District of Columbia.[13] Thus a Presidential or Vice Presidential candidate who qualifies in less than 10 States will be entitled to equal opportunities, freedom from censorship, lowest unit rates, "reasonable access," etc., only in those States in which he or she qualifies, but candidates who qualify in 10 or more States will gain these rights in all States.

16. In one case, a complainant was found not to be a bona fide write-in candidate for U.S. President in New York State, because he had not met his burden of establishing to the stations from which he sought broadcast time that he had "engaged to a substantial degree in activities commonly associated with political campaigning." Rather, his limited campaign activities predominately took place in the Buffalo metropolitan area and, therefore, he did not establish a campaign presence in a "substantial part" of that state.[14]

Rulings by State Officials

17. When a State Attorney General or another State official who has authority to decide a candidate's legal qualifications has ruled that a candidate is not legally qualified under the State's election laws, a station normally is not required to make "equal opportunities" available to the candidate. The ruling of the authorized State official will normally be accepted as final unless there is a judicial decision to the contrary.[15]

18. A write-in candidate for mayor sought time equal to that given the only two candidates whose names appeared on the ballot. Under State law, only the two candidates receiving the

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[11] See §§73.1940(a)(3) and 76.5(y)(3) of the rules. Also, §§73.1940(a)(5) and 76.5 (y)(5) for "substantial showing."

[12] See §§73.1940(a)(4) and 76.5(y)(4) of the rules in the Appendix.

[13] See §§73.1940(a)(2) and 76.5(y)(2) of the rules in the Appendix.

[14] *Michael Stephen Levinson*, 87 FCC 2d 433 (1980).

[15] *Socialist Workers Party*, 40 FCC 280 (1956); *Lester Posner*, 15 FCC 2d 807 (1968); *Malcolm Cornell*, 31 FCC 2d 649 (1971). (For an example of a somewhat different result in a case involving a State official's opinion, see par. 9.)

largest number of votes in the primary election would become the "official candidates" in the final election. The Secretary of State, who was the "Ex Officio Chief Elections Officer" of the State, gave an opinion that write-in candidates were not "official candidates" and therefore were not entitled to equal time. However, the licensee of the station sought a ruling from the Commission because the write-in candidate was eligible to hold the office of mayor if elected and his name could be written on the ballot. The Secretary of State's opinion stated only that write-in candidates were not "official candidates" and did not state that they were not "legally qualified candidates." The Commission found that since the candidate here could be voted for by the write-in method and was eligible to hold the office he sought, he might, under the FCC rules, be a legally qualified candidate if he made a substantial showing that he was a bona fide candidate.[16] In a contrasting case that arose under the laws of a different State, the Commission held that since the Attorney General of the State had ruled that there was no provision in the law for casting write-in votes in a primary election and that a person did not become a legally qualified candidate in a primary until he filed his "notification and declaration paper" with the office specified by law, the person was not a legally qualified candidate until this paper had been filed.[17]

Write-In Candidate Must Declare Self

19. Is a candidate entitled to "equal opportunities" as a write-in candidate while still seeking enough signatures on petitions to qualify for the ballot, if he tells the FCC that he intends to run as a write-in candidate should he fail to obtain a place on the ballot? In a ruling later appealed to the courts, the Commission found that the candidate was not entitled to equal opportunities as a write-in candidate since he intended to seek election by that method only if his current effort to obtain a place on the ballot failed.[18] The candidate appealed to the U.S. Court of Appeals for the 7th Circuit. Although for technical legal reasons the court did not vacate the particular Commission ruling that was challenged, it disagreed with the Commission's finding that the appellant could not obtain status as a write-in candidate while seeking ballot status by the petition method. The court said that "a candidate who has not yet qualified for ballot position under State election laws is nevertheless entitled to equal time if he is otherwise eligible under the [write-in rules] and commits himself to seeking election by the write-in method in the subsequent election." The court further stated that "it is sufficient that the candidate indicate to the stations from whom equal time is sought that he will continue to campaign as a write-in candidate regardless of the outcome of his petition efforts. We query whether it would be sufficient for a candidate merely to indicate that, if his petition effort failed, he would be agreeable to voters writing in his name, but that is not the case here. Flory [the candidate] indicated he would continue an active campaign."[19] As a result of this decision, the Commission amended its political broadcasting rules regarding the requirements for becoming a write-in candidate to read as quoted in the Appendix to this Primer and require a write-in candidate to have "publicly committed himself to seeking election by the write-in method. . . ."[20]

Who is Not A Candidate For Public Office?

20. The names of candidates for delegates to the Democratic National convention did not appear on the ballot in the California Presidential primary. Instead, the electorate voted solely for the candidate for nomination to the Presidency. If one of a presidential candidate's

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[16] *Tom Leonard,* 29 FCC 2d 177 (1969).

[17] *Rady Davis,* 40 FCC 435 (1965).

[18] *Ted Pearson,* 48 FCC 2d 1091 (1974), review denied, 48 FCC 2d 1247 (1974).

[19] *Flory* v. *Federal Communications Commission and the United States of America,* 528 F. 2d 124, 131 (7th Cir., 1975).

[20] *In the Matter of Amendment of Part 73 of the Commission's Rules,* 60 FCC 2d 615 (1976).

proposed convention delegates appeared on a TV station, would the station have to grant "equal opportunities" to anyone else because of his appearance? No. The Secretary of State and the Attorney General of California stated that "California does not consider a candidate for delegate on a slate of delegates in a Presidential primary to be a legally qualified candidate for public office." The Commission ruled that in view of this opinion and the facts of the case, broadcasts by a delegate would not fall within the scope of Section 315.[21] However, under the laws of some States, persons seeking election as delegates to State constitutional conventions have been considered legally qualified candidates for public office by the State officials authorized to make such rulings. In such cases, candidates for delegate are candidates for public office under the FCC rules.

21. A station refused to sell time to a person for a broadcast advocating the election of another person to the office of County Executive because the station believed that the message was "in bad taste." A complaint was filed, claiming that the station's action violated Section 315(a) because it amounted to censorship since the complainant himself was a candidate for County Republican Committeeman. The Commission upheld the station's right to use its discretion as to accepting the message the complainant wanted to broadcast. The Director of the New York State Election and Law Bureau ruled that the office which the complainant himself sought—County Republican Committeeman—was a "party position" and not a public office. Therefore the complainant was not a candidate for public office and the no-censorship provision of Section 315(a) did not apply to him.[22]

22. Under State law, the Maryland General Assembly was authorized to fill a vacancy in the office of Governor created by the resignation of the former Governor. A complainant sought air time on the grounds that he was a legally qualified candidate for the office of Governor. The station claimed that the complainant was not a legally qualified candidate for public office within the meaning of Section 315. The station forwarded a letter from the Deputy Attorney General of Maryland which stated that "the impending legislative action (by the General Assembly) is not an election" as defined by Maryland law and that "the present contest for the office of Governor is not a process by which the voters of this State shall elect a Governor." The Commission found that the position of the station was not unreasonable in view of the circumstances of the case.[23]

23. A person who meets the definition of a candidate as given in the Federal Election Campaign Act is not necessarily a legally qualified candidate for purposes of the Communications Act. The only definition of a candidate appearing in the Federal Election Campaign Act applies only to Chapter 14 of that Act and does not affect the definition of a legally qualified candidate for purposes of Section 315 of the Communications Act.[24]

24. Several New York City mayoralty candidates have filed "the necessary authorization of candidacy under Section 481 of the New York State Election Law," which apparently is required before fund-raising operations may begin. Are they legally qualified candidates for public office under the Communications Act? Not necessarily. Unless such filings under State law "would also qualify such candidates for places on the ballot, such filings would not make these candidates 'legally qualified' so as to bring the equal opportunity provisions of Section 315 into play."[25]

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[21] *KNBC-TV*, 23 FCC 2d 765 (1968); see also, *Russell H. Morgan*, 58 FCC 2d 964 (1976).

[22] *Malcom Cornell*, 31 FCC 2d 649 (1971).

[23] *Lester Posner*, 15 FCC 2d 807 (1968).

[24] *In re Federal Election Campaign Amendments of 1974*, 55 FCC 2d 279 (1975); *Anthony Martin-Trigona*, 67 FCC 2d 33 (1977); National Citizens Committee for Broadcasting *et al.*, 75 FCC 2d (FCC 79-440). For further discussion of the Federal Election Campaign Act, see paragraph 95 re: "Identifying Sponsor of Broadcast."

[25] *Letter to Hon. Percy E. Sutton*, 67 FCC 2d 188 (1977).

Broadcasts On Distant Stations

25. Do "equal opportunities" apply to a broadcast by a candidate for Mayor of City "A" on a station in City "B" whose service area does not extend as far as City "A"? No. The candidate for Mayor of "A" is not a legally qualified candidate for public office in the area served by the station in "B" for the purposes of Section 315. The purpose of Section 315, as shown by the legislative history, is to prevent a candidate from obtaining an unfair advantage over an opposing candidate by broadcasting to the voters in the election in which both are taking part where the opposing candidate is denied a chance to broadcast to these voters. Here the candidate would not be broadcasting to the persons who were to vote in his election.[26]

Rivals in Recall Balloting are Candidates

26. Citizens of a Colorado city were to vote whether to recall a District Attorney. On the same ballot, two other persons were listed as candidates to succeed the incumbent if the voters should decide to recall him. The incumbent asked to buy time on a TV station to defend his record and attack his critics. The station sought a declaratory ruling on whether the incumbent District Attorney was a legally qualified candidate for public office within the meaning of Section 315. The Colorado Attorney General stated that the two alternative candidates on the ballot were legally qualified candidates for public office, but he had not decided whether the incumbent office holder was a legally qualified candidate. If he were a legally qualified candidate, Section 315(a) would prohibit censorship of his broadcasts. The U.S. Supreme Court has held that since a station cannot censor a legally qualified candidate, the station will not be subject to liability for civil damages for any libelous statements the candidates may broadcast.[27] The Commission ruled that the incumbent and the two alternative candidates on the ballot all should be considered legally qualified candidates for public office. It stated that to rule otherwise would be unfair to the incumbent who could be censored while defending himself, whereas his two opponents could not be censored. Also, the alternative candidates, but not the incumbent, could obtain the station's lowest unit charge for time. Even the alternative candidates might be at a disadvantage if the incumbent were ruled not to be a legally qualified candidate, since they would not be entitled to opportunities equal to those of the incumbent if he should appear on the air. Thus, a contrary ruling would result in inequities to both the District Attorney and the alternative candidates.[28] However, when the recall ballot lists only the official on whose recall the public is to vote and does not list any candidates seeking to succeed him, the incumbent official is not a "legally qualified candidate for public office" for purposes of Section 315. The Fairness Doctrine would, of course, apply to the recall proposition.

Candidates "With No Chance To Win"

27. A station may not deny "equal opportunities" to a candidate because it believes he has no chance of being nominated or elected. If a candidate is legally qualified as defined in the rules and further explained in this section, he is entitled to his rights under Sections 315 and 312(a)(7) regardless of whether a station licensee thinks he has any chance of success.[29]

Election Ends "Equal Time" Rights

28. If a candidate does not prove his legal qualifications until after the date of nomination for the office which he was seeking, or if, although a candidate was qualified from the beginning, he files a complaint after the nomination has taken place, he is not entitled to the

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[26] *Letter to Peter A. Mobilia, Jr.*, June 17, 1977; *Bob White*, 87 FCC 2d 748 (1980).

[27] *Farmers Educational and Cooperative Union of America* v. *WDAY, Inc.*, 360 U.S. 525 (1959).

[28] *Petition of Station KOAA-TV*. FCC 78-286 (April 25, 1978).

[29] *Columbia Broadcasting System, Inc.*, 40 FCC 244 (1952).

"equal opportunities" that would have been available to him if he had proved his qualifications or filed a complaint before the nomination date. The occurrence of nomination or election ends the possibility of affording equal opportunities. However, the Commission itself can take post-election action against a broadcaster who is found to have violated the law before the election.[30]

When Are Candidates "Opposing Candidates?"

29. When Congress adopted Section 315 it indicated that its reason for requiring equal opportunities was to make sure that opposing candidates receive the same treatment—that, if one candidate for an office gets air time, his opponent "for that office" will be entitled to equal time. The FCC has for many years interpreted Section 315 to mean that before the primaries or the nominating conventions take place, only those candidates who seek the nomination of the same party for the same office are entitled to opportunities equal to those of each other, since only *they* are opponents at that point. The U.S. Court of Appeals for the District of Columbia Circuit upheld the Commission's position on this question in *Kay v. FCC*,[31] stating, in part,

> . . . Congress intended by the language it did employ to. . .restrict the benefits of "equal opportunities" *to candidates of the same class or character* as the candidate or candidates who may have been permitted to use a broadcasting station in the first place.

This interpretation of the statute also allows a station to serve the public interest more fully in some instances by devoting more time to one primary race than to another. For example, an incumbent office holder may have little or no opposition to renomination by his party, and consequently there may be little public interest in that party's nomination for that office, whereas half a dozen candidates may be waging vigorous campaigns for nomination to the same office by the other major party. The station may rightly decide that the public interest will be better served by allocating more time to the hotly contested race than to the other one.

Examples of Application of the Law

30. Examples of how the "equal opportunities" law applies to different situations are given in the following paragraphs:

(a) *Candidates for nomination by same party to same office.* A, B, and C are candidates for nomination for sheriff by the Good Government Party. If a station makes time available to A, and if B and C request equal opportunities, the station must grant their request because they are opposing candidates for nomination by the same party to the same office.

(b) *Candidates for nomination by different parties.* A station makes time available to A, B, or C, candidates for nomination for sheriff by the Good Government Party. X, Y, and Z are seeking the nomination for sheriff by the Square Deal Party. If they demand time equal to that made available to A, B, or C, the station need not make it available to them so far as Section 315 is concerned, since at this point X, Y, and Z are opponents of each other but not of A, B, or C. The Commission has long held that, while both primary and general elections fall within the scope of Section 315, such elections must be considered independently of each other, and equal opportunities, within the meaning of Section 315, need be afforded only to legally qualified candidates for the same office in the same election.[32] However, it should be noted that a station's actions in such cases are also subject to its general public interest responsibility to present discussion of important political matters and to comply with the Fairness Doctrine; moreover, if the nomination is for a Federal elective office, Section 312(a)(7) of the Communications Act requires the station to provide "reasonable access" to all of the candidates upon request. For further discussion of these subjects, see paragraphs 72-77 and 89-94 on, "How Much Time Must a Station Provide" and "The Fairness Doctrine in Political Broadcasting."

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[30] *Lar Daly,* 40 FCC 273 (1956), aff'd by order dismissing appeal entered March 7, 1957, *Lar Daly* v. *U.S.A.* and *FCC* Case No. 11946 (7th Cir., 1957), rehearing denied by order entered April 2, 1957, cert. den., 355 U.S. 826, rehearing denied 355 U.S. 885 (1957); *Lar Daly,* 40 FCC 317 (1960).

[31] *Kay* v. *FCC.* 443 F. 2d 638, 645 (D.C. Cir. 1970).

(c) *Candidates for Different Offices.* May a station make time available to all candidates for one office in a general or primary election and refuse time to all candidates for another office? Yes. So far as the requirements of Section 315(a) are concerned, a licensee may limit the sale of time to candidates for those offices which the licensee determines are particularly important.[33] However, see paragraph 30(b) above on other factors to be considered, including the "reasonable access" requirement for Federal elective candidates.

(d) *Candidates in primary elections and general election for same office.* A station which makes time available for candidates for nomination to an office in a *primary* election need not make time available to a candidate for the same office in the *general* election unless it has made time available to another candidate for the office in the *general* election. Primary and general elections must be considered independently of each other, as explained in 30(b) above.[34]

(e) *When does nomination take place?* On May 3, 1964, a Congressman from New York made a television appearance. At this time, he was the only person who had been designated by petition under New York law as Republican nominee for election to his Congressional seat. The only designated Democratic-Liberal nominee filed a complaint requesting equal time. Primaries of both parties were to be held on June 2, 1964, but if no petitions for write-in nominees were filed by May 5, 1964, no primaries would be held, since the incumbent and the complainant each would have the uncontested nomination of his party. In fact, no petitions for write-in status were ever filed. Was the station right in refusing equal opportunities to the complainant on the ground that on May 3 each was merely a candidate for his party's nomination, and thus they were not opposing candidates? The Commission found that the station was right. The issue must be decided according to New York election laws, and the Commission normally would rely upon the interpretation of the laws by State officials. However, neither the complainant nor the Commission was able in this case to get such an interpretation from State officials, so the Commission was compelled to make its own interpretation. It ruled that as of May 3, the date of the broadcast, neither the incumbent Congressman nor the Democratic-Liberal complainant had become the nominee of his party since two more days remained in which other persons could file write-in petitions for nomination. Therefore, the incumbent and the complainant were not opposing candidates for Congress at the time of the broadcast.[35] It should be noted that the rulings in these cases were based upon the laws of New York, which under certain circumstances allow a person to become his party's nominee without the holding of a primary election. The cases with different results cited in 30(b) of this section arose in states with different legal requirements for qualifying as a party's nominee.

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[32] *Hon. Joseph S. Clark,* 40 FCC 332 (1962); *Hon. Clarence E. Miller,* 23 FCC 2d 121 (1970); *Richard B. Kay,* 24 FCC 2d 426 (1970) aff'd; *Kay* v. *FCC,* 443 F. 2d 638 (D.C. Cir. 1970); *KTTS,* 23 FCC 2d 771 (1970); reconsid. denied, 24 FCC 2d 541 (1970), *Mr. William A. Barnstead,* 72 FCC 2d 499 (1979).

[33] *Lew Breyer,* 31 FCC 2d 548 (1968); *Foster Furcolo,* 48 FCC 2d 565 (1974).

[34] *KWFT, Inc.,* 40 FCC 237 (1948).

[35] *Mrs. Eleanor Clark French,* 40 FCC 417 (1964); see, also, *Thomas G. Dignan,* 62 FCC 2d 59 (1976).

What is a "Use" of a Station by a Candidate?

31. In general, any broadcast or cablecast of a candidate's voice or picture is a "use" of a station or cable system by the candidate if the candidate's participation in the program or announcement is such that he will be identified by members of the audience. However, Section 315 of the Communications Act lists four types of broadcasts by candidates which are not considered to be uses. These exceptions are discussed in paragraphs 38 to 55 under the heading, "What Appearances by Candidates Are Not 'Uses'?"

Supporter's Appearance Is Not a "Use"

32. If a supporter of a candidate appears on the air to urge his election, is it a use? No. Only a personal appearance by a legally qualified candidate for public office, by voice or picture, is a use. The legislative history of Section 315 shows conclusively that when Congress enacted it in 1934, it understood that the provisions of that section "applied only to the personal use of radio facilities by the candidates themselves. . . ."[36] Although the "equal opportunities," lowest unit charge, "no-censorship" and "reasonable access" (for Federal candidates) provisions of the law apply only to appearances by candidates themselves, the Fairness Doctrine may require that "quasi-equal opportunities" be made available to the supporters of a candidate if supporters of the candidate's opponent have been given or sold time by a station.[37] For further discussion of the Fairness Doctrine as it applies to political campaigns, see paragraphs 89-93 dealing with the Fairness Doctrine.

Most Appearances by Candidates Are "Uses"

33. Even if a candidate does not discuss his candidacy during a broadcast, his opponent is entitled to equal opportunities except in certain situations specified by law. As noted in the first paragraph of this section, Section 315(a) lists four types of broadcasts which are not considered to be uses. However, with these exceptions, all appearances on the air by candidates are considered to be uses, and licensees of stations are not authorized to base their grant or denial of time to candidates on their judgment of whether the use of the time will aid or even be connected with their candidacies.[38] This interpretation of "use" has at times led, to rulings which may seem far-fetched to some persons, but as the Court of Appeals for the Ninth Circuit noted in upholding this position,[39] neither the wording of Section 315 nor the legislative history of it or its subsequent amendments indicate that Congress intended the Commission to distinguish between political and non-political uses by candidates. The court stated:

> . . . [U]nless a clear rule exists that all broadcast use by a political candidate subjects a station to equal time obligations . . . ultimately the FCC would be forced to examine the nature of a candidate's every appearance to determine whether it falls under Section 315.

The court agreed with the Commission that attempting to distinguish between a political and nonpolitical use of broadcast facilities by candidates would require the Commission to make "highly subjective judgments concerning the content, context, and potential impact of a candidate's appearance." The court also stated:

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[36] *Felix* v. *Westinghouse Radio Stations, Inc.*, 186 F. 2d 1, 5 (3d Cir. 1950); cert. denied, 341 U.S. 909 (1951).

[37] *Nicholas Zapple*, 23 FCC 2d 707 (1970).

[38] *Socialist Labor Party*, 40 FCC 241 (1952); *Fordham University*, 40 FCC 321 (1961).

[39] *Paulsen* v. *FCC* 491 F. 2d 887, 891 (9th Cir., 1974).

> If the Section [315] were invoked only when political issues actually were discussed . . . a station could support one candidate by inviting him or her to appear on numerous shows but strongly discouraging the discussion of political issues. True, Paulsen might not benefit from such treatment if, as he says, he is already well known to the viewing public, but a less popular or less well-exposed candidate could surely benefit from the exposure. To define such appearances as nonpolitical is to apply a rather narrow and perhaps a bit naive definition of "political." . . A candidate who becomes well-known to the public as a personable and popular individual through "non-political" appearances certainly holds an advantage when he or she does formally discuss political issues to the same public over the same media.

Moreover, since Section 315 generally prohibits any censorship by a station of material broadcast by a candidate, the station itself would be violating the statute if it attempted to limit candidates' broadcasts to material advocating their election or even merely referring to their campaigns. But see paragraphs 61 and 63(g), below, as to whether Section 315 would require the broadcast of obscene material in violation of applicable Federal criminal laws.

Examples of "Uses"

34. If a candidate makes a broadcast in some capacity other than as a candidate, his opponent still is entitled to equal opportunities. With the exception of appearances in news programs as cited in Section 315(a), all personal appearances by candidates are uses. Examples in which the Commission has ruled an appearance to be a use, even though the appearance was in some other capacity than that of candidate, include the following, in some of which the candidate's opponent would be entitled to free time, since the candidate himself did not pay for his time.

(a) *The President of the United States.* The President traditionally has broadcast a 5-minute message "kicking off" the United Fund and Community Chest campaigns. The message is filmed, videotaped and audiotaped far in advance of its broadcast. If the President is a candidate for reelection at the time the message is broadcast, his opponents are entitled to equal time, since the broadcast cannot "reasonably be said to constitute 'on-the-spot' coverage of bona fide news events within the meaning of section 315(a)(4)," and the law makes no exceptions for messages carried "in the public interest" or as a "public service."[40] However, for examples of broadcasts by Presidents running for reelection which have been ruled exempt from the "equal opportunities" provision of Section 315 because they were official reports to the public on matters of major importance, see paragraphs 47 to 48 "What Appearances by Candidates Are Not 'Uses'?"

(b) *Congressman's Report to His Constituents:* After he becomes a legally qualified candidate for reelection, a Congressman's Reports are uses.[41] A weekly Report is a use even when broadcast in its entirety within a newscast, which is normally *not* a use under Section 315(a)(1).[42] In the latter decision, the Commission cited the legislative history of the 1959 amendments of 315(a) as showing that Congress did not intend for Congressmen's Reports to constituents to become exempt from the equal opportunities requirements of Section 315 merely by being aired in newscasts.

(c) *Judge's Appearance on Panel.* A judge who was a candidate for reelection appeared in a panel discussion of an important subject with a number of other persons. The judge's candidacy was not mentioned nor was the election in which he was to take part. Nevertheless, his appearance was a use since the panel discussion was not an exempt news-type program.[43]

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[40] *United Way of America,* FCC 75-1091.

[41] *Clinton D. McKinnon,* 40 F.C.C. 291 (1957); *Hon. Joseph S. Clark,* 40 F.C.C. 325 (1962).

[42] *Letter to Hon. Clark W. Thompson,* 40 F.C.C. 328 (1962).

[43] *Rev. Charles E. Reichenbach,* 35 F.C.C. 2d 568 (1972).

(d) *Movie Actor.* If an actor becomes a legally qualified candidate for public office, his appearances on telecasts of his movies thereafter will be uses, entitling his opponents to equal time, if the actor is identifiable in the movies.[44]

(e) *Radio or TV Performer.* If he is identified or identifiable on the air, appearances on radio or television in the course of a performer's regular duties, such as announcing, singing, acting or newscasting, are uses, entitling his opponent to equal time.[45] However, the Commission has ruled in the case of the host of a teenage dance show, who also was a candidate for public office, that opponents of the performer were entitled only to time equal to that during which the performer appeared on camera rather than to time equal to the duration of the entire program.[46] The same principle would apply to other appearances by radio or TV performers; for example, the political opponent of a radio disc jockey would be entitled only to the amount of time in which the disc jockey's voice was heard—not to the time used for playing records. If the announcer's voice is neither identified nor identifiable to the public, his air appearance is not a use.[47] However, where the newscaster on a radio station is identified by name up to the date of his candidacy but not thereafter, his continuing newscasts are uses.[48] Note: In some instances, when on-air employees of stations have become candidates for public office, the stations have sought waivers or partial waivers of their "equal time" rights from opposing candidates. Some partial waivers have been based on an agreement by an opposing candidate to settle for use of a certain number of free spots and/or programs rather than using the whole amount of time to which he might be entitled each week if the station employee were, for example, a disc jockey, an announcer or a newscaster. Opposing candidates have no obligation to grant waivers, and when they have granted them, the waivers have usually included a condition that the station employee make no reference to his candidacy during his regular broadcasts. The Commission has stated that:

> Waivers given with full knowledge of the relevant facts concerning the broadcast[s] (and assuming of course the . . . conditions were adhered to) would generally be binding. . . [49]

(f) *Appearance on Variety Program.* A Presidential candidate's appearance on a network variety program is a use.[50]

(g) *Speech by Candidates.* A Presidential candidate made a speech which was broadcast by a station "as a public service." The Commission ruled that regardless of the station's evaluation of the speech, the broadcast was a use.[51]

(h) *Minister on Religious Program.* A church sponsored a 30-minute religious program. The minister appearing on the program became a candidate for public office. The minister's appearance on the program was a use and opponents would be entitled to equal time. The opponents would be entitled to *free* time (since the minister himself did not pay for it) unless the church congregation or board of trustees which paid for the program stated that they were buying the time to advance the candidacy of their minister.[52]

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[44] *Adrian Weiss (Ronald Reagan films),* 58 F.C.C. 2d 342 (1976), review denied 58 FCC 2d 1389 (1976); *Pat Paulsen,* 33 F.C.C. 2d 297 (1972); aff'd 33 F.C.C. 2d 835 (1972); aff'd, sub nom. *Paulsen* v. *F.C.C.,* 491 F.2d 887 (9th Cir. 1974).

[45] *Kenneth E. Spengler,* 40 F.C.C. 279 (1956); *KUGN,* 40 F.C.C. 293 (1958).

[46] *WNEP-TV,* 40 F.C.C. 431 (1965).

[47] *WENR,* 17 F.C.C. 2d 613 (1969); *KYSN Broadcasting Co.,* 17 F.C.C. 2d 164 (1969).

[48] Assuming his voice is identifiable. *See Public Notice: Newscaster Candidacy,* 40 F.C.C. 433 (1965); see, also, *Station WBAX,* 17 F.C.C. 2d 316 (1969) and *RKO General, Inc.,* 25 F.C.C. 2d 117 (1970).

[49] *WBTW-TV,* 5 F.C.C. 2d 479, 480 (1966).

[50] *Lar Daly.,* 40 F.C.C. 314 (1960).

[51] *KFI,* 40 F.C.C. 257 (1952).

(i) *More Examples of Uses.* A political party buys TV time to distribute to individual candidates for use as they choose. Is there a use by a candidate in any of the following situations? (a) The camera pans a group of candidates seated in a studio while a non-candidate reads a political spot; (b) a non-candidate reads a political spot while movie film of a candidate is on the screen; (c) a photograph of a candidate appears on the screen while a non-candidate reads a political spot. Yes, each of these situations is a use.[53]

(j) *Advertiser-Candidate Reads Own Commercials.* An advertiser on a station regularly voices his own commercials. If he runs for city council, will his commercial appearances be uses? If so, will he have to buy "equal time" for his opponents? His identified appearances are uses but since he is paying for his time, his opponents also would have to pay for their time.[54]

(k) *Drawings of Candidate.* A campaign committee prepares 60-second spot announcements in which a drawing of the face of a candidate appears during the sponsorship identification section of the ad. Will the entire spot be a use? Yes. The use of a drawing or other pictorial representation of the candidate will be a use if it is identified or identifiable as that candidate, and will make the whole commercial a use.[55]

"Fleeting" Appearances Not a Use

35. The National Urban Coalition requested a declaratory ruling on a two-minute public service TV announcement featuring 120 people, many of them leading personalities in the political, sports and entertainment fields, all singing as a group the song, "Let the Sun Shine In." No one's name was mentioned nor were any voices separately identifiable. After the announcement was filmed, one of the persons appearing in it became a candidate for public office. In an edited version of the spot which eliminated a close-up of the candidate, the candidate was nevertheless visible in two shots—one for 4.2 seconds in a long-range shot of 100 persons, and the other for 2.8 seconds in a medium-range shot of about six people, in which only the lower half of his face was seen. Would the spot be a use? No. The Commission ruled that this was not a use because the candidate was not readily identifiable in either spot.[56] Also of interest in connection with the question here raised was the Commission's *Interpretative Opinion on Section 315 of the Act,*[57] in which, at p. 749, the Commission referred to an earlier case in which a candidate's fleeting appearance at a public ceremony had been held not to be a use. The Commission stated:

> To have held otherwise [in the earlier case] would have required the station to afford an opportunity for an appearance by an opponent for a period ranging from a fraction of a second to perhaps a few seconds. If the *de minimis* principle of law is applicable to matters such as this, it was clearly applicable to the facts of that case.

Broadcasts on Foreign Stations

36. Broadcasts by American political candidates on foreign stations whose signals are received in this country do not come within the scope of Section 315, because it applies only to broadcasting and other communications systems regulated by the FCC.[58]

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[52] *Rev. Billy Robinson,* 23 F.C.C. 2d 117 (1970).

[53] *KWWL-TV,* 23 F.C.C. 2d 758 (1966).

[54] *Georgia Association of Broadcasters,* 40 F.C.C. 343 (1962); see, also, *KTTV,* 40 F.C.C. 282 (1957) and *Joseph V. Gartlan, Jr.,* 32 F.C.C. 2d 609 (1971).

[55] *Carter/Mondale Reelection Committee,* 80 FCC 2d 285 (1980).

[56] *National Urban Coalition,* 23 FCC 2d 123 (1970).

[57] *Interpretative Opinion on Section 315 of the Act,* 26 FCC 715 (1959); *Time Inc.,* ________ FCC 2d ________, (Mimeo No. 2192, released January 31, 1984).

[58] *Gregory N. Pillon,* 40 F.C.C. 267 (1955).

How Much of an Appearance Makes a Use?

37. How much of an appearance on a spot or program must a candidate make in order for the spot or program to be ruled a use? In the case of *spots,* if a candidate makes any appearance in which he is identified or identifiable by voice or picture, even if it is only to identify sponsorship of the spot, the whole announcement will be considered a use.[59] In the case of a *program,* the entire program is a use if "the candidate's personal appearance(s) is substantial in length, integrally involved in the program, and indeed the focus of the program, and where the program is under the control and direction of the candidate." The Commission stated in this case that it believed that under such circumstances the station would have immunity from liability for libelous statements made by other persons appearing with the candidate, since the entire program would be a use by the candidate and the station could not censor statements made by either the candidate or other persons appearing on the program.[60]

What Appearances by Candidates Are Not "Uses?"

38. Almost all appearances by legally qualified candidates for public office are "uses" except in four types of news programs which have been declared by Congress *not* to be uses. These exempted types of programs, as listed in Section 315(a), are:

(1) bona fide newscasts.
(2) bona fide news interviews.
(3) bona fide news documentaries (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

Thus, pictures of candidates, statements made by candidates and interviews with them on any of these types of news program do not entitle their opponents to equal opportunities, since they are not uses. For the same reason, a station may select what part or parts of a candidate's statements it will broadcast on such programs, because the no-censorship restriction of Section 315(a) does not apply.

Examples of Appearances Which Are Not Uses

39. (a) A candidate, legally qualified for reelection to federal office, was designated as the spokesman for the Republican party and Ronald Reagan, and was to appear in political advertisements in that capacity. The Commission ruled that the advertisements in question would not constitute uses for the candidate on stations not serving his district since he was not a legally qualified candidate in those areas. Also, the advertisements would not constitute uses for Mr. Reagan because neither his picture nor his voice was used. Of course, on stations serving the candidate's district, the advertisements would be uses, since he was a legally qualified candidate in his own district.[61]

(b) A complainant alleged that a bona fide news interview program had lost its exemption because the station allowed the candidates to argue between themselves and thus did not exercise sufficient control over the program. However, the only two examples offered in support of the claim were that a candidate interrupted a reporter to rebut her opponent directly, and that a candidate read from a book to rebut her opponent, not to answer a question. These two brief incidents were held to be insufficient to indicate that the station had lost control of the 30-minute program, and thus the program retained its Section 315(a)(2) exemption.[62]

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[59] *Charles F. Dykas,* 35 F.C.C. 2d 937 (1972); *Station WITL,* 54 F.C.C. 2d 650 (1975).
[60] *Gray Communications Systems, Inc.,* 14 F.C.C. 2d 766 (1968); reconsid. denied, 19 F.C.C. 2d 532 (1969).
[61] *Bob White,* 87 FCC 2d 748 (B/C Bur. 1980).

(c) An independent presidential candidate (Candidate A) appeared on the "Today Show"—a program previously ruled to be exempt under Section 315(a)—for five straight days during NBC's coverage of the Republican National Convention. Candidate B protested the network and stations' denial of his request for equal opportunities in response to the candidate's appearances. He argued that the coverage given Candidate A, who was on a trip abroad, "was not an exercise of good faith, journalistic judgment of the newsworthiness of the event and was 'intended to promote [Candidate A's] candidacy.' " The Commission rejected this argument and held that the candidate's appearances fell within the exemptions for bona fide news events, including convention coverage, and bona fide news interviews. The Commission indicated that when determining whether a particular program falls within an exemption, the Commission examines the bona fides or good faith judgment *of the broadcaster* in carrying the interview or event, rather than the "bona fides" *of the news events* or the personality who appears.[63]

Commission Given Broad Discretion

40. In amending Section 315(a) in 1959 to insert the news-program exemptions, Congress stated that the Commission should have broad discretion in interpreting the new policy. The Senate Report stated:

> It is difficult to define with precision what is a newscast, news interview, news documentary, or on-the-spot coverage of a news event
>
> . . . That is why the committee in adopting the language of the proposed legislation carefully gave the Federal Communications Commission full flexibility and complete discretion to examine the facts in each complaint which may be filed with the Commission. . . . In this way the Commission will be able to determine on the facts submitted in each case whether a newscast, news interview, news documentary, [or] on-the-spot coverage of news event . . . is bona fide or a "use" of the facilities requiring equal opportunity.[64]

Bona Fide Newscasts

41. Commission rulings on various aspects of the "bona fide newscast" exemption include the following:

(a) *Interviews with candidates on newscasts.* A candidate complained that four local TV stations had violated Section 315 by interviewing his opponents on their regular news programs but not interviewing him. The complainant was not entitled to equal opportunities since the appearances of his opponents were on bona fide newscasts. The Fairness Doctrine might be applicable but the complainant here had not furnished enough information for the Commission to decide whether it had been violated.[65]

(b) *"Today" and "Tonight" programs.* A candidate requested time equal to that given two opposing candidates, one of whom was interviewed on the "Today" program and the other on the "Tonight" program. The appearance of the candidate on the "Today" program fell within the news program exemption of Section 315(a) "since it was a regularly scheduled network program containing different features and emphasizing news coverage, news interviews, news documentaries and on-the-spot coverage of news events . . . the determination of the content and format of Senator Symington's interview and his participation therein was made by NBC in the exercise of its news judgment and not for the Senator's political advantage . . . questions asked of the Senator were determined by the special projects director of the program, and . . . the Senator was selected by reason of his newsworthiness and NBC's desire to interview him concerning current problems, issues and events." On the other hand, the appearance on the Jack Paar "Tonight" program was not exempt. NBC itself listed the program on its program log as a "variety program."[66]

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[62] *Jan Tucker,* (Letter of October 31, 1980, Mimeo No. 01348), *review denied,* 88 FCC 2d 429 (1981).

[63] *H. Richard Mayberry, Jr., Esq.,* 87 FCC 2d 757 (1980).

[64] *Sen. Rep. No. 562, 86th Cong., 1st Sess. 12 (1959).*

[65] *KRON-TV, et al.,* 47 FCC 2d 1204 (1974).

(c) *Five-Part Interview with Candidate.* A candidate for the Republican Presidential nomination complained that a Florida television station had denied him time equal to that devoted to five interviews with an opposing candidate. The interviews had been broadcast on successive days on a regularly scheduled news program, shortly before the Florida primary was to take place. The complainant alleged that the station had recorded one 30-minute interview with the opposing candidate and had broken the interview down into five segments for use on the news program. The complainant stated that because of the content of the interviews and the fact that they were prerecorded, were unusual in length for a news program, and were telecast shortly before the primary, they did not gain exempt status by being broadcast on a news program. In reply, the licensee of the station stated that it had broadcast many similar series of interviews on news programs in the past; that in this instance it had sought for two years to obtain an interview with the opposing candidate (who was the incumbent President) and had succeeded in obtaining one only on the day that the first segment of the interview was broadcast; and that it already had broadcast a half-hour interview with the complainant and intended to carry his scheduled appearance on the NBC "Meet the Press" program on the Sunday preceding the State primary. The Commission denied the complaint. It stated that "The inclusion of an interview within a newscast, which it broadcast outside the newscast would not be exempt, is within a station's journalistic discretion and, in and of itself, would not preclude the interview from exempt status pursuant to Section 315(a)(1) unless it has been shown that such a decision is clearly unreasonable or in bad faith. You have failed to submit sufficient evidence of bad faith or unreasonableness on the part of WCKT which would compel us to question its actions . . . you have not shown that the licensee, in deciding to air [the interviews], considered anything other than their newsworthiness."[67]

(d) *Religious News Programs.* A minister who conducted a weekly religious news program asked if the news program exemption would apply to interviews on his program with two other ministers who were candidates for public office. The FCC ruled that the exemption would apply since the program dealt with current news in the field of religion and was a bona fide newscast.[68]

(e) *No News Exemption for Newscaster-Candidate.* A station claimed that broadcast of news by its news director, who also was a candidate for public office, were exempt from the equal time requirement because Section 315(a)(1) exempts appearances of legally qualified candidates on bona fide newscasts. The Commission ruled that the exemption did not apply. It said that Congress indicated that its main purpose in amending Section 315 to create an exemption for news programs "was to allow greater freedom of the broadcaster in reporting news to the public, that is to say, in inserting appearances of candidates as part of the contents of news programs." It said, "The amendment did not deal with the question of whether the appearance of station employees who have become candidates for office should be exempted on a news-type program where such employees are announcing the news (rather than being a part of the content of the news). . . ."[69]

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[66] *Lar Daly,* 40 FCC 314, 315 (1960).

[67] *Letter to Citizens for Reagan (WCKT-TV),* 58 FCC 2d 925, 927 (1976).

[68] *Telegram to Reverend Donald L. Lanier,* October 26, 1972.

[69] *Public Notice: Use of Station by Newscaster Candidate,* 40 FCC 433, 434 (1965).

(f) A television station broadcast two nonregularly scheduled special news programs about the ABSCAM tapes. Candidate A claimed that he was entitled to equal opportunities since his opponent for federal office was featured in the tapes. The Commission denied the complaint because the program fell within the newscast exemption. In making its decision the Commission considered the facts that the tapes were released shortly before the programs occurred; the programs centered exclusively on the tapes; the licensee considered the subject of the tapes an extremely newsworthy event in its area which warranted immediate coverage because they involved a congressman from the area served by the station; and, the opponent's appearance was incidental to the coverage of a newsworthy event.[70]

Bona Fide News Interviews

42. The principal questions considered by the Commission in interpreting the law on exemption of news interviews from the equal opportunities requirement of Section 315 are:

(a) Does the interview take place on a bona fide *news* program? If so, the interview is exempt regardless of its subject matter, the type of person interviewed or whether the news program always contains interviews. (See discussion of "Today" and other news programs in 41(b), (c), (d), and (e) of this part of the Primer.)

(b) If the interview does not take place on a bona fide *news* program, does it take place on a bona fide *news interview* program? (Many "interview" and "talk" programs do not qualify as *news interview* programs.)

In its rulings on whether a program is a news interview program, the Commission has considered the following factors:

(i) Whether it is regularly scheduled;
(ii) How long it has been broadcast;
(iii) Whether the broadcaster produces and controls the program;
(iv) Whether the broadcaster's decisions on the format, content and participants are based on his reasonable, good faith journalistic judgment rather than on an intention to advance the candidacy of a particular person;
(v) Whether selection of persons to be interviewed and topics to be discussed are based on their newsworthiness.

News Interview Programs Ruled Exempt

43. Some examples of interview programs which the Commission has ruled exempt are:

(a) *"Meet the Press," "Face the Nation," "Issues and Answers."* These are typical news interview programs of the kind Congress indicated it had in mind when it created the "bona fide news interview" exemption in 1959.[71]

(b) *"Youth Wants to Know."* This program also was mentioned in the Senate debates on the 1959 amendments to Section 315(a) as being a news interview program of the type Congress intended to exempt, thus revealing that Congress did not intend to limit such programs to those in which the questioners are professional newsmen.[72]

(c) *"Phone In" Question-and-Answer programs.* A program called "Phone Forum" was prepared and produced by a station's news department and had been regularly scheduled for almost 2 years. The news director selected the guests on the basis of newsworthiness.

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[70] *Robert R. Burke,* 87 FCC 2d 438 (1980).

[71] *Letters to Andrew J. Easter,* 40 FCC 307 (1960), *Lar Daly,* 40 FCC 310 (1960), *Hon. Frank Kowalski,* 40 FCC 355 (1962); *Telegram to Yates for U.S. Senator Committee,* 40 FCC 368 (1962).

[72] *Hon. Russell B. Long,* 40 FCC 351 (1962); *Socialist Labor Party,* 7 FCC 2d 857 (1967); also, see *Lar Daly,* 40 FCC 310 (1960), dealing with "College News Conference."

Members of the public telephoned in questions for the guest, which were screened by the moderator. The program was ruled a bona fide news interview on the condition that it be effectively controlled by the licensee and that the station's news department controlled the selection of the phone-in questions which actually were asked the guests, so as to make sure "that the program cannot be taken over by either the supporters or opponents of the guest candidate.[73] Another program in which part of the questions were called in by viewers of the program, but those actually used were selected by employees of the station, also was held to be an exempt news interview program.[74]

(d) *"Governor's Radio Press Conference."* In a regularly scheduled program, the Governor spoke from his office in answering questions asked him by newsmen from stations participating in the program, who spoke to the Governor by telephone. The answers were communicated back to the stations by radio line. Neither the questions asked nor the answers were screened or edited by the Governor's office. The program was unrehearsed and the newsmen were free to ask any questions they wished. Each broadcast was under the control of the participating stations. It was found to be an exempt news interview program because it had been regularly scheduled for some two years, was under the sole control of the broadcasters and was not conceived or designed by them to further the candidacy of the Governor.[75] (This case arose before the Aspen Institute ruling, which exempted press conferences, so it was decided on the basis of the news interview exemption. In the same ruling, the Commission found that another program by Governor Di Salle was not exempt. See "Governor's Forum" below.)

(e) *"NET Journal" and "60 Minutes."* Questions have been raised at various times about interviews with political candidates on the "NET Journal" and "60 Minutes." Both programs have been ruled exempt. In view of the fact that "NET Journal" was a regularly scheduled program, the news interview format was one that was regularly used, the format and questions and the news interviewees were decided by NET and the factors in selecting the interviewees were the public significance of the individuals and their news interest, the Commission concluded that the interviews on "NET Journal" met the requirements of a bona fide news interview within the meaning of Section 315(a)(2).[76] The "60 Minutes" program has these same characteristics and therefore interviews with candidates on it do not create equal opportunity rights for their opponents.[77]

Interview Programs Ruled Not Exempt

44. Some examples of question-and-answer programs which the Commission has ruled are not exempt news interview programs are:

(a) *"Governor's Forum."* In this program the Governor sat in his office and answered questions submitted by members of the public. Questions either were written directly to the Governor's office or telephoned to the stations participating in the program. Questions written to the Governor's office were selected by his staff for the broadcast, and after the Governor had recorded answers to these and to questions forwarded by the stations, his office sometimes edited the tape before sending the recorded program to the participating stations. In contrast to its ruling on "Governor's Radio News Conference" above, the Commission ruled that "Governor's Forum" was not a news interview program within the meaning of section 315(a)(2), because the selection and compilation of the questions, as well as the supervision, production and editing of the program, were not solely under the control of the stations.[78]

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[73] *Socialist Labor Party,* 7 FCC 2d 857 (1967).

[74] *Martin B. Dworkis,* 40 FCC 361 (1962); see, also, *Letter to Storer Broadcasting Co.,* July 22, 1977.

[75] *Hon. Michael V. DiSalle,* 40 FCC 348 (1962).

[76] *Socialist Workers Campaign Committee,* 14 FCC 2d 858 (1968).

[77] *Letter to CBS,* 58 FCC 2d 601 (1976).

(b) *One-Time "Special" Interview.* A station interviewed a candidate for reelection as Congressman about his experiences as a new Congressman. The station said it did not have any regularly scheduled news interview programs, but that the interview with the Congressman was based on the licensee's news judgment that a staff member conducted the program and asked questions relating to newsworthy current events; that the program was initiated, produced and controlled by the station, and that the interview, the format and the nature of the questions were the same as those of other special one time interviews broadcast by the station. The Commission ruled, however, that the program did not fall within the news interview program exemption of Section 315(a)(2) because, in creating the exemption, Congress had clearly indicated that a basic element of a bona fide news interview program is that it be regularly scheduled.[79]

(c) *Program Starting 11 Weeks Before Election.* A station asked for a declaratory ruling on a proposed news interview program titled "Know Your Congressman," which would feature as guests local members of Congress. The program would be presented every other week and would begin only 11 weeks before the primary election. After reviewing the legislative history of the 1959 amendments to Section 315(a), the Commission stated that "it is apparent that Congress was concerned about news interview programs created and/or scheduled shortly before an election. . . . The program for which you seek a ruling is scheduled to begin only 11 weeks before the Pennsylvania primary elections, and will feature incumbent Congressmen. Under these circumstances and in light of the legislative history, we do not believe that we can rule at this time that 'Know Your Congressman' falls within the category of programs that are exempt from the 'equal opportunities' provision of Section 315."[80]

(d) *"Tomorrow" program.* Time equal to that devoted to interviewing an opposing candidate was sought on the NBC "Tomorrow" program on the grounds that it was not a bona fide news interview program. NBC asserted that its basic format was an interview with one or more guests, conducted by an experienced journalist, and that many public officials and office seekers had appeared on it. The complainant submitted a sampling of 66 "Tomorrow" programs as showing that it had no regularly scheduled news interview format. It cited 27 programs which discussed "a broad range of topics not associated with any recent news or current event issue, including interviews or panels on "monsters in films to sexual fantasies to psychic healing and TV soap operas." The complainant stated that 19 of the guests were interviewed "solely in regard to their occupation or their hobbies. Strippers, handwriting analysts, travel agents and baseball card collectors discuss their interests. . . ." The Commission found that "Tomorrow" was not a news interview program for the purposes of Section 315(a)(2). It said Congress did not intend to exempt all programs and had specifically cited, during floor debate on the proposed amendments, certain programs such as "Meet the Press" and "Face the Nation" as being the type of interview programs it meant to exempt. One question considered by the Commission in ruling on interview programs is whether the guests have been chosen to appear on the basis of their newsworthiness. In the case of "Tomorrow," although some interviews had been newsworthy, many had not and "interviewees, as a matter of course, are not selected on the basis of their 'public significance or their newsworthiness. . . . There is simply no cognizable difference between this show and 'Tonight,' a program which also on occasion interviews newsworthy public figures. . . . We cannot accept the view that the intermittent appearances of public officials and political candidates indicate that a program is a news interview program. . . ."[81]

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[78] *Hon. Michale V. DiSalle,* 40 FCC 348(1962).

[79] *Station KFDX-TV,* 40 FCC 374 (1962).

[80] WIIC-TV, 33 FCC 2d 629 (1972).

Changes in Time and Length of News Interview Programs

45. Because of the importance of an upcoming election, networks or stations sometimes increase the length of regularly scheduled news interview programs featuring one or more candidates. They also may change the times at which the programs are broadcast in order to reach larger audiences. Unless there is evidence that a station's or network's decision to lengthen the program or change its time period was unreasonable or made in bad faith, the program does not lose its news interview exemption. A broadcaster may "in the exercise of its good faith news judgment, lengthen a 'bona fide news interview' without destroying the exemption provided. . . . Also, the mere change in placement of a program which would otherwise qualify for exemption does not remove the exemption because it is broadcast in other than at its regularly scheduled time slot."[82]

Rebroadcasts of News Interviews by Other Stations

46. With the permission of the originating stations, a noncommercial TV station regularly broadcasts a bona fide news interview program originated by another station. The program is taped and played back by the ETV station three weeks later. The rebroadcasts do not lose the exemption, since they are regularly scheduled and since the program as broadcast by the originating station fulfilled all requirements for a bona fide news interview. Although, as rebroadcast by the ETV station, the program has not been produced or controlled by the station rebroadcasting it, neither does a network affiliate "produce or control" a network news interview program that it broadcasts. It has delegated these functions to the network, relying on the network to fullfill the requirements for the news interview exemption. The fact that the rebroadcast is three weeks late is not significant in determining whether the program remains exempt from equal opportunities obligations, since it is not claimed to be "on-the-spot coverage of bona fide news events."[83] However, in another case a noncommercial station wished to rebroadcast only one of a series of bona fide news interviews broadcast by another station. This changed the facts so significantly as to compel an opposite ruling. Here, so far as the rebroadcasting station was concerned, the news interview program was not regularly scheduled. The Commission has always emphasized that one of the critical factors in qualifying for exempt status is that the news interview program be regularly scheduled.

Bona Fide News Documentaries

47. A candidate complained that he had been denied 93 seconds of time which were due to him because of appearances of his two opponents on a network program titled "Television and Politics." The complaint was denied. The program was a news documentary which was exempt from the equal opportunities requirement under Section 315(a)(3) because an appearance by a particular candidate was incidental to the presentation of the general subject matter of the documentary, which was the use of television by candidates rather than the candidacy of any particular candidate or candidates.[84]

The Commission has held that it prefers to take a case-by-case approach in determining whether a "significant" appearance of a candidate in a documentary denies the documentary exemption under Section 315(a)(3).[85]

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[81] *Socialist Workers Party*, 65 FCC 2d 234, 241 (1976); see also, *Socialist Workers Party*, 66 FCC 2d 1080 (1976).

[82] *Letter to Theodore Pearson*, December 8, 1976, which cited as precedents: *Martin Dworkis*, 40 FCC 361 (1962); *Honorable Terry Sanford*, 35 FCC 2d 938 (1972); *Honorable Sam Yorty*, 35 FCC 2d 572 (1972).

[83] (See discussion of "on-the-spot coverage" exemption, starting in paragraph 9).

[84] *Richard B. Kay*, 26 FCC 2d 235 (1970); see also, *Judge John J. Murray*, 40 FCC 350 (1962).

On-the-Spot Coverage of Bona Fide News Events

48. The fourth type of news broadcast on which a candidate's appearance is not a use is "on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto.)" The scope of this exemption was considerably increased by the Commission in 1975 when it reversed earlier decisions and held that, under certain conditions, broadcasts of debates between candidates and of press conferences of candidates would fall within the on-the-spot coverage exemption.[86]

(a) *President's Report on Suez Crisis.* Three TV networks requested a ruling as to whether their broadcast of a 25-minute report to the Nation by the President on an important international situation (the Suez crisis) required them to afford equal time to all opposing candidates, since the President was at the time a candidate for reelection. The majority of the Commission ruled that equal time for other candidates was not required because they believed that when Congress enacted Section 315 it did not intend to grant equal time to all Presidential candidates "when the President uses the air lanes in reporting to the Nation on an international crisis."[87] (Note that this ruling came before the adoption by Congress in 1959 of the exemptions to the equal opportunities requirement of Section 315, including the exemption for "on-the-spot coverage of bona fide news events.")

(b) *President's Report on Other Major Developments.* While a candidate for reelection, the President broadcast a report to the Nation on an important announcement by the Russian Government of a change in its leadership and on the explosion by Communist China of a nuclear device. Two opposing candidates requested equal time. On the basis both of the Suez crisis decision, above, and of the later amendment by Congress of Section 315 so as to exempt on-the-spot coverage of bona fide news events from the equal opportunities requirement, the President's broadcast did not entitle opposing candidates to equal time. The case fell within "the reasonable latitude for the exercise of good faith news judgment on the part of the [licensee]" which Congress said it intended to grant stations and networks when it adopted the exemption for on-the-spot coverage of bona fide news events.[88] In a later case, the broadcast of a President's State of the Union Message also was found to fall within the "on-the-spot coverage of a bona fide news event" exemption of Section 315(a)(4)."[89]

(c) *Political Conventions.* Section 315(a)(4) specifically mentions on-the-spot coverage of political conventions "and activities incidental thereto," so the Commission has uniformly ruled such coverage to be exempt. In one case, a candidate for Presidential nomination called a press conference at the convention site immediately prior to the convention. Although this case preceded the 1975 *Aspen* ruling on debates and press conferences, coverage of the press conference was ruled exempt under Section 315(a)(4).[90] The broadcast of acceptance speeches of successful candidates for a party's nomination for the President and Vice President are exempt as activities incidental to the convention.[91] During its coverage of the 1976 Democratic National Convention, a network interviewed a candidate for nomination. An opposing candidate alleged that the interview was "remote from and unrelated to the Convention." The station replied that the interview occurred during on-the-spot coverage of the convention and was therefore exempt under Section 315. The Commission ruled the interview exempt because it was broadcast as part of the coverage of the convention. The Commission stated that it "will not substitute its judgment for that of the broadcaster in determining what 'activities' are 'incidental' to a political convention.[92]

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[85] *Henry Geller*, FCC 2d (FCC 83-529, November 16, 1983).

[86] For discussion of this ruling and cases that have arisen under it, see "Aspen Institute Rulings," paragraphs 10 and 11 below.

[87] *Telegram to ABC, CBS, and NBC*, 40 FCC 276 (1956).

[88] *Republican National Committee*, 40 FCC 408 (1964); affirmed per curiam by an equally divided court, sub nom. *Goldwater v. FCC and U.S.A.*, Case No. 18963 (D.C.Cir. 1964); cert. denied, 379 U.S. 893 (1964).

[89] *Lar Daly*, 59 FCC 2d 97 (1976); rev. den., June 16, 1976.

[90] *Lar Daly*, 40 FCC 316 (1960).

[91] *DeBerry-Shaw Campain Committee*, 40 FCC 394 (1964).

(d) *St. Patrick's Day Parade.* A Chicago television station broadcast the annual St. Patrick's Day parade in that city. The Mayor, who was a candidate for reelection, was on camera for approximately 2 minutes. An opposing candidate sought equal time. Since the appearance of the Mayor was during "on-the-spot coverage of a bona fide news event" it was exempt from the equal opportunities requirements of Section 315.[93]

(e) *Broadcast of Court Proceedings.* An Indiana station had broadcast for 14 years a program entitled "Gary County Court on the Air." It was broadcast live 3 days per week and taped 1 day in advance for broadcast on the 4th day. The program consisted of direct coverage of the proceedings of a typical city court and by its nature could not be tailored to suit the presiding judge. Its format had remained unchanged since it went on the air. Persons appearing in the court had the privilege of declining to have their cases heard during the broadcast time to prevent invasion of privacy, and if, in the opinion of the presiding judge, certain cases did not lend themselves to broadcasting, they were heard at times when the broadcasts were not in progress. The judge who had presided during the past 7½ years became a candidate for nomination for Mayor of Gary. His opponent demanded equal time based on broadcasts of the program. The Commission ruled that the program fell within the "on-the-spot coverage" exemption of Section 315(a)(4) because it covered the operation of an official government body and the court proceedings were newsworthy. Thus, the program was within the reasonable latitude allowed to station licensees for the exercise of good faith news judgment.[94]

(f) *Announcement of Vice Presidential Candidate.* On August 5, 1972, Senator George McGovern, the Presidential nominee of the Democratic Party, announced that R. Sargent Shriver was his choice to replace Senator Thomas Eagleton as the Democratic Party's Vice Presidential candidate. The broadcast in which Senator McGovern made the announcement was approximately 16 minutes long and was carried live by four networks. Three other political parties complained that the networks had refused their candidates equal time. The Commission denied the complaints, stating:

> "We believe that Senator McGovern's appearance was exempt within the meaning of Section 315(a)(4) because it was incidental to political convention—namely, the special meeting of the Democratic National Committee which had been called to select a new candidate for Vice President. . . . Senator McGovern's announcement of his choice was an activity incidental to the final voting of Democratic Party officials at their August 8 special meeting called specifically to select a new Vice Presidential nominee. The August 8 meeting had many elements similar to those of a national party convention. . . . Although the meeting was extraordinary and not in the normal course of planning by the party, the Commission believes that, given the unique circumstances here present, it must be considered as having been the equivalent of a political convention within the meaning of Section 315(a)(4). . . ."[95]

(g) *Jackie Robinson Award.* NBC, which held TV rights to the World Series, stated that it had been informed that during ceremonies preceding one game of the series an award would be presented by a legally qualified candidate for public office to Jackie Robinson commemorating the 25th anniversary of his joining the Brooklyn Dodgers as well as his work in the field of drug addiction. NBC stated that it would cover the presentation even if no candidates for public office were appearing and that it believed that the broadcast of the presentation should be ruled exempt from the equal opportunities provision of Section 315(a) as on-the-spot coverage of a bona fide news event. The Commission responded that on the basis of the facts presented it found no reason to believe that NBC's judgment about the proposed event was either unreasonable or made in bad faith, and no reason for overruling NBC's judgment that the proposed ceremony would be a bona fide news event within the meaning of Section 315(a)(4).[96]

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[92] *Letter to Lester Gold, Esq.*, August 12, 1976.

[93] *Lar Daly*, 40 FCC 377 (1963).

[94] *Thomas R. Fadell, Esq.*, 40 FCC 379 (1963); aff'd by order entered April 29, 1963,; *Thomas R. Fadell v. U.S., FCC and WWCA Radio Station*, Case No. 14142 (7th Cir. 1963).

[95] *Complaints of Republican National Committee, Socialist Labor Party, Communist Party, U.S.A.*, 37 FCC 2d 799, 806 (1972).

Aspen Institute Rulings

49. In 1975 the Commission overruled three of its earlier rulings and held that under certain conditions, broadcasts of debates between political candidates and broadcasts of press conferences held by candidates could be considered exempt from "equal opportunities" because they were on-the-spot coverage of bona fide news events. In this ruling and a further discussion of the subject in a later case, the Commission stated, in substance, that the broadcast of a debate might be considered on-the-spot coverage of a bona fide news event under the circumstances presented in the earlier cases which were reversed. In those cases, (a) the debate had been arranged by a party not associated with the broadcaster; (b) it took place outside the broadcaster's studios; (c) it was broadcast live and in its entirety; and (d) the broadcaster chose to cover the debate because of this reasonable, good faith judgment that it was newsworthy, and not for the purpose of giving a political advantage to any candidate. The Commission also ruled that press conferences of candidates could qualify for exemption under Section 315(a)(4) if broadcast live and in their entirety.[97]

50. A 1983 ruling expanded the Aspen decision and held that broadcaster-sponsored debates are entitled to the Section 315(a)(4) exemption. In the reaching that decision, the Commission stated that although there is a chance that freedom and flexibility accorded to broadcasters in their news programming might result in favoritism among candidates, Congress intended to permit that risk in order to foster a more informed electorate. The Commission's view is that the common denominator of all exempt programming is bona fide news value.[98]

Does Delayed Broadcast of Debate Destroy Exemption?

51. No, in a 1983 ruling,[99] the Commission eliminated the so-called one-day rule, which required nearly contemporaneous broadcast coverage, calling it unduly restrictive. The Commission held that a broadcaster's good faith determination to delay or rebroadcast a newsworthy debate later than the day after the event in order to maximize audience potential may come within the exemption. The "rule-of-thumb" on the meaning of the Section 315(a)(4) exemption is that it encompasses news reports of any reasonably recent event intended in good faith by the broadcaster to inform the public and not intended to favor or disfavor any candidate.

Ford-Carter Debates

52. Two Presidential candidates complained in September 1976 that they has not been included in the debates between President Ford and Democratic candidate Carter nor had they

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[96] *National Broadcasting Co., Inc.*, 37 FCC 2d 678 (1972).

[97] *Aspen Institute*, 55 FCC 2d 697 (1975); affirmed sub nom. *Chisholm et al. v. FCC*, 538 F. 2d 349 (D.C. Cir., 1976); cert. denied, 97 S. Ct. 247 (1976).

[98] *Henry Geller*, FCC 2d (FCC 83-529, November 16, 1983).

[99] *Henry Geller*, FCC 2d (FCC 83-529, November 16, 1983).

been given equal time. One complainant, Eugene McCarthy, asserted that exclusion of any "major" or "serious" candidate (which he said he was) from the debates took them outside the *Aspen Institute* exemption. The other, Lester Maddox, stated that the debates promoted only the interests of the two participating candidates, that the two candidates themselves controlled some of the debate arrangements, and that the so-called "debates" actually were panel discussions. Both complaints were turned down. As for the McCarthy complaint, the Commission had no authority to compel either the organization sponsoring the debates or the networks broadcasting them to invite a particular candidate to take part, nor could it force any candidate to appear and debate another candidate. As for the Maddox complaint, the Commission said the critical factor in determining whether a debate falls within the "on-the-spot coverage" exemption was the role and intent of the broadcaster in covering it—whether it did so on the basis of its good faith, reasonable journalistic judgment of the newsworthiness of the event, or whether it did so to serve the political advantage of a candidate. The Commission quoted the court decision affirming the *Aspen* ruling to the effect that "a candidate's partial control over a press conference or debate does not, by itself, exclude coverage of the event from Section 315(a)(4)." As for the claim that the Ford-Carter appearances were actually panel discussions, the Commission cited a dictionary definition of "debate" as "contention by words or arguments. . .as. . .a regulated discussion of a proposition between two matched sides." The Commission said that in the absence of a stronger showing than Maddox had presented that the debates should not be considered debates, "it would be inappropriate and in violation of the intent of Congress for the Commission to attempt to establish or sanction a particular qualifying format or structure as a 'debate' to the exclusion of all other face-to-face confrontations between candidates."[100] (Both McCarthy and Maddox also alleged violation of the Fairness Doctrine in their complaints. For discussion of that policy as it applies to political campaigns, see the discussion in paragraphs 89-94 of "The Fairness Doctrine in Political Broadcasting."

Cases Held Not To Fall Within "Aspen" Exemption

53. Inquiries were received from two stations in 1976 as to whether the *Aspen* ruling discussed above would grant exemption from equal time requirements to stations broadcasting "forums" or "town meetings" in which only one candidate appeared, gave an address or opening statement and then answered questions from the audience or from a panel of community leaders. The Commission ruled that neither kind of appearance came within the scope of the *Aspen* ruling, since neither could be characterized as either a debate or a press conference as defined in that ruling.[101]

What are "Equal Opportunities?"

54. Many persons use the term "equal time" when referring to the rights of political candidates, but the correct phrase is "equal opportunities," which does not necessarily mean the same thing as "equal time."[102] For example, if Candidate Smith receives an hour of free time at 8 p.m. on a television station and his opponent Jones merely gets an hour early in the morning or after midnight, Jones will be getting "equal time" but not "equal opportunities," since he probably won't be seen or heard by nearly as many people as Smith. Similarly, if a station gives Smith free time but charges Jones for his time, Jones again will get "equal time" but not "equal opportunities." The Commission's rules forbid any kind of discrimination by a

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[100] *American Independent Party and Eugene McCarthy,* 62 FCC 2d 4 (1976); affirmed *sub nom., McCarthy v. FCC,* D.C. Cir., Oct., 1976, Case No. 76-1915; *Cert. denied,* 430 U.S. 955 (1977).

[101] *Chicago Educational Television Association (WTTW),* 58 FCC 2d 922 (1976); *Station WCLV (FM),* 59 FCC 2d 1376 (1976).

[102] In order to avoid repetitious language, we have sometimes referred to "equal time" in this Primer, but we mean "equal opportunities" unless otherwise indicated.

station between competing candidates.[103]

Examples of Lack of Equal Opportunities

55. Cases in which the Commission has found a denial of equal opportunities include the following:

(a) *Unequal audience potential of periods.* There is a violation if a station makes available to a candidate the same amount of time his opponent has received, but the time is likely to attract a smaller audience.[104]

(b) *Letting one candidate preview opponent's message.* Letting Candidate A listen to a recording of his opponent B's broadcast before it is aired and before A records or broadcasts his own statement without affording opponent B the same opportunity violates the anti-discrimination rule.[105]

(c) *Forcing one candidate to submit script in advance.* It is a violation to compel one candidate but not his opponent to submit the text of his proposed message in advance of its broadcast.[106]

(d) *Unequal rates.* Charging one of two opposing candidates a higher rate than the other violates the rules, as does letting one candidate combine his totals of 30 and 60 second spot announcements to arrive at a cumulative total entitling him to a discount which is denied his opponent.[107]

(e) *Failure of candidate-station owner to pay for spots.* The Commission refused to renew the license of a station because, among other things, the station manager and one-third owner, who also was candidate for mayor, sold himself time at a lower rate than he charged his opponent and never even paid the station for the time he used. The Commission stated here, as in an earlier case, that where a licensee or principal of a station also is a candidate, he has a special obligation to make sure the station deals fairly with opposing candidates.[108]

(f) *Sales or contracts that result in excluding candidates.* Section 73.1940(c) of the rules forbids a station to make any agreement or contract that has the effect of letting one candidate broadcast to the exclusion of his opponents for the same office. Therefore, wise station operators have learned to look ahead when one candidate seeks to buy large amounts of time to make sure that they will be prepared to make equal opportunities available to his opponents if they request time.

(g) *Special "all-candidate" programs.* A station wishes to make a full broadcast day or a large part of a day, available free to candidates for various offices. It proposes to ask all candidates who do not take part in the broadcast to sign a waiver of their rights to appear on a later date. It also proposes to inform all candidates that if any of them do not take part in the special program and refuse to sign a waiver the licensee will cancel all invitations to candidates for that particular office and notify the other candidates for that office of the reason for cancellation. The Commission has commended stations for trying to set up special programs in which the voters will be able to see and hear all candidates. It also has stated that a station may make an offer of time to candidates for a certain office contingent on all candidates agreeing to appear or to waive their rights to a later opportunity to appear. It has stated that such waivers, when given by a candidate with full knowledge of the facts, would be binding on the candidate. However, it has emphasized that under Section 315, a candidate not appearing on such a program and refusing to sign a waiver is exercising rights expressly given him by Congress. Blaming a candidate on the air for refusing to waive his rights may create a Fairness Doctrine obligation on the part of the station. An attempt by a licensee to dictate program format, participants, length of program and times of taping and broadcast, and then offering the package to the candidates on a "take it or leave it" basis, does not deprive a candidate who refuses such an invitation of his right under Section 315 to appear subsequently.[109]

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[103] See §§73. 1940(c) and 76.205(c) of the rules.

[104] *E. A. Stephens*, 11 FCC 61 (1945).

[105] *Station WANV*, 50 FCC 2d 177 (1974); forfeiture affirmed, 54 F.C.C. 2d 432 (1975).

[106] *Western Connecticut Broadcasting Co. (WSTC-AM-FM)*, 43 F.C.C. 2d 730 (1973). (For a discussion of a licensee's right to require advance scripts or recordings of all candidates, see paragraph 2(d) of the section below on "Censorship" (page 58).

[107] *Station KAHU*, FCC 71-959; *KAYS, Inc. (KFEQ)*, FCC 73-1121.

[108] *WPRY Radio Broadcasters, Inc.*, 40 FCC 2d 1183 (1973); see, also, *Emerson Stone, Jr.*, 40 FCC 385 (1964).

(h) *Failure of station to follow its interview format.* All five candidates for Governor appeared in a special one-time news interview which was not exempt from equal opportunities. A panel of newsmen asked questions of the candidates. During the first part of the program, the newsmen asked a series of questions to each of the candidates in rotation. During the remainder of the program, each newsman questioned the candidate or candidates of his choice. In a briefing session before the broadcast, all candidates were promised a chance to volunteer comments about answers given by other candidates during the second part of the program, but they were requested first to seek recognition from the moderator. One candidate later complained that during the second part of the program (i) she never was recognized although she continually raised her hand; (ii) even during the first part of the program the newsmen asked the Democratic and Republican candidates multiple questions which gave them almost twice the time allowed to the other candidates; (iii) the two major party candidates talked back and forth to each other without being recognized by the moderator; and (iv) when the complainant tried to comment on another candidate's answer without being recognized, she was interrupted by the moderator. The station conceded the accuracy of much of her complaint but said there was no attempt to exclude her in particular and all of the candidates often raised their hands without being recognized. The Commission stated that it was proper for a station and candidates to agree in advance on a format and procedures for such a program, but that here the station had not enforced the agreement and the complainant got less than five minutes of time whereas one candidate received over 16 minutes and another nearly 14. Therefore, the complainant was entitled to some additional time.[110]

Cases Where Equal Opportunities Were Given

56. Situations in which the Commission has found there was no violation of the equal opportunities requirement include the following:

(a) *No need to notify candidate of opponent's time.* If a station sells or gives time to one candidate, it need not notify his opponents of the fact. However, 73.1940(d) of the rules requires stations to keep and permit public inspection of a complete record of all requests for time made by candidates, how each request was disposed of, and what charges, if any, were made. Thus, by inspecting the records of stations in the area of his candidacy, a candidate can learn what time has been given or sold to his opponents.[111]

(b) *Particular time periods and programs.* All a station need do is to make available periods of approximately equal audience potential to competing candidates to the extent that this is possible. They need not make available exactly the same time of day on the same day of the week or accept competing political advertisements on exactly the same programs or series of programs.[112] Even if a candidate's opponent has made no broadcasts at all, a station need not sell him the particular time period he requests.[113]

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[109] *Letters to Senate Committee on Commerce*, 40 FCC 357 (1962), and *WBTW-TV*, 5 FCC 2d 479 (1966); *Licensee Obligations in Political Campaigns*, 14 FCC 2d 765 (1968).

[110] *Socialist Workers Party*, 26 FCC 2d 485 (1970). (See(g), below, for a somewhat similar case with a different outcome.)

[111] *Norman William Seemann, Esq.*, 40 FCC 341 (1962); also, see discussion of "political files" in paragraph 99 under "Miscellaneous Rules and Policies."

In another case, the candidate accepted an offer from the network of a later afternoon time period in response to a prior use in prime time. He subsequently contended that his appearance did not constitute an equal opportunity. The Commission rejected the complaint on the facts, finding that the candidate's acceptance, without objection, of the time slot the network offered was dispositive of the station's equal opportunities obligation. The Commission, in making its decision, also noted that the candidate's appearance was "likely to attract approximately the same size audience as that of his opponent."[114]

(c) *No need to halt sales to "A" because "B" doesn't buy.* If one candidate or political committee buys considerably more time than the opposing candidate or committee, a station need not halt sales to the first candidate or committee. All it need do is to be prepared to afford equal opportunities if a candidate seeks them.[115] (However, see 55(f) above regarding contracts for time that result in denying equal opportunities to opposing candidates for the same office).

(d) *Withdrawal of time offer by station.* A station which offers time to all candidates for an office for a joint appearance on one program or an appearance in a special series of programs may withdraw the offer if one or more of the candidates refuses to appear. The equal opportunities requirement of Section 315(a) applies only to actual uses of a station's facilities by candidates.[116]

(e) *"News coverage" is not involved in "equal opportunities."* The appearance of a candidate on any of the four kinds of news broadcasts listed in Section 315(a) as not involving "uses" of a station does not entitle his opponent to equal exposure on such a news broadcast or series of broadcasts, nor do news items about a candidate on such broadcasts entitle his opponent to equal news coverage. However, the Fairness Doctrine applies to news programs.[117]

(f) *All opposing candidates not entitled to appear on same program.* A station that puts two opposing candidates on a non-exempt debate, interview or panel discussion need not include in the same program all other candidates for that office, provided the others are given time separately.[118] If two candidates share an hour's time which is approximately equally divided between them, a third candidate seeking separate time needs to be given only half an hour in order to gain equal opportunities.[119]

(g) *News interview with all candidates.* All eight candidates for Democratic Senatorial nomination appeared on a program in which newsmen asked them questions and the moderator relayed other questions telephoned in by viewers. One candidate complained that one of the candidates got nine minutes of time in answering questions, another six and a half minutes and none of the others more than about three minutes. The Commission denied the complaint because the station's invitation to the candidates had not made any representations that were not carried out. It merely had stated that questions would be asked by the newsmen and the moderator and that after the questioning, each candidate would be given one minute for a closing statement, which was done. In contrast to the case in 55(h) of this section, the station here had followed the format agreed to by the candidates in advance.[120]

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[112] *Major General Harry Johnson*, 40 FCC 323 (1961); *Socialist Workers Party*, 40 FCC 256 (1952); *Harry Dermer*, 40 FCC 407 (1964).

[113] *KTRM*, 40 FCC 331 (1962).

[114] *Citizens for LaRouche, Inc.*, 88 FCC 2d 443 (1980).

[115] *Hon. Frank M. Karsten*, 40 FCC 269 (1955).

[116] *Stations KHJ-TV and KABC-TV*, 23 FCC 2d 767 (1966); also, see *H. John Rogers*, 59 FCC 2d 1109 (1976).

[117] See discussion of Fairness Doctrine in paragraphs 89–93.

[118] *Constitutional Party and Frank W. Gaydosh*, 14 FCC 2d 255 (1968); rev. den'd, 14 FCC 2d 861 (1968).

[119] *Conservative Party*, 40 FCC 1086 (1962); *Andrew J. Watson*, 26 FCC 2d 236 (1970).

(h) *Minor technical failure doesn't destroy "equal opportunities."* A debate between opposing candidates which was not exempt from the equal opportunities requirement was videotaped by one station. Another station arranged to have a copy of the tape made for broadcast at 10:30 that night. At approximately 6 p.m. it learned that because of technical failure of the first station's videotape recorder, the video portion of two minutes and 50 seconds of Candidate A's closing remarks was lost, although the audio recording was not affected. In broadcasting the tape that night, the station substituted a still picture of the candidate on screen when the playback of the final remarks began, but the image of the still picture became defective and the station then substituted a slide entitled "Technical Difficulties" while it continued to broadcast the audio portion. Candidate A demanded an opportunity to telecast that part of his remarks in which the picture was lost. The Commission denied the complaint because the station had substantially complied with the rules, the audio portion was broadcast without interruption, and the licensee appeared to have made a reasonable effort to remedy the defect in the video portion.[121]

(i) *"Make good" announcements or programs.* In contrast to the situation in (h) above, a station sometimes will have more serious technical problems in broadcasting a program or an announcement, so that only part of the candidate's message gets on the air, or the message is so badly garbled that it cannot be understood. When this happens to commercial advertisements, most stations broadcast "make good" programs or announcements without charging the advertiser for them, in order to give him his money's worth. However, when stations broadcast "make good" political announcements, other candidates for the same office sometimes demand free time equal to that in the "make good" on the grounds that the original candidate is getting more time than he paid for. If it is a station's policy to give "make goods" to commercial advertisers and if there is a substantial failure in the first broadcast of a spot or program sponsored by a candidate, then the station will incur no "equal time" obligations to other candidates if it broadcasts a "make good." This policy applies only when "make good" announcements are given because of technical difficulties. Other "make good" situations are dealt with on a case-by-case basis. For example, when a station has broadcast an announcement which is a "use" by a candidate at the wrong time or has broadcast a different announcement by him than the one he ordered used at a particular stage of his campaign, any free "make good" time given to the candidate might entitle his opponent to free time of equal length. Other situations may call for different conclusions. These interpretations have been given informally by the staff in response to questions, but they are affirmed by the Commission. (See also, paragraph 104 on a related subject—disputes between stations and candidates over the performance of contracts for the sale of time.)

Free v. Paid Time

57. In September 1980 the Commission was faced for the first time with the implications of large broadcast purchases by organizations outside the control and authorization of any candidate.[122] A reelection committee sought a declaratory ruling that a broadcast "use" by Candidate A in a presidential election campaign, which is paid for by a committee purporting to be independent of Candidate A, entitles opposing candidates to free equal time. The Commission rejected this, stating that in deciding whether free as opposed to paid equal opportunities should be made available, the controlling factor is the nature of the broadcaster's role in the initial use. For example: (a) where a station presents a program featuring a candidate and merely sells commercial spots around the broadcast, the candidate's

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[120] *William A. Albaugh (WBAL-TV),* 59 FCC 2d 1023 (1976).

[121] *Sen. Birch Bayh,* 15 FCC 2d 47 (1968).

[122] *Carter/Mondale Reelection Committee,* 81 FCC 2d 409 (1980).

opponent will be entitled to free time;[123] (b) where the broadcaster acquires a program which contains a use by a candidate, from a syndicator or from some other source, the candidate's opponent will be entitled to free time;[124] (c) where the broadcaster sells either a spot or a larger block of time to the candidate, an authorized agent or any third person and a "use" is presented, free time need not be afforded regardless of the nature of the third party or its relationship to the candidate.[125] This case overruled prior cases which dealt with the issue of when free or paid time need be afforded.

58. In another case, an "unauthorized political committee" sponsored several television commercials which were critical of a U.S. Senator who was seeking reelection. The ads did not contain the voice or image of the Senator's opponent. The Senator requested free equal time to respond to the ads. The station denied his request for free equal time but said it was willing to extend "equal opportunities" to the Senator's committee on a paid basis. The Commission applied the reasoning in the *Carter/Mondale* case, and held that the station acted reasonably by offering the Senator's Committee comparable time to respond on a paid basis to advertisements sponsored by a "third party."[126]

Miscellaneous Rulings

59. The Commission has ruled on a variety of other equal opportunities inquiries and complaints that do not fall under any of the headings in 55 or 56 above. Examples of these follow:

(a) *Must a station furnish anything more than the use of a microphone?* Regardless of what it furnishes in connection with a broadcast by a candidate, it must treat him and his opponents in the same way.[127] In television, if such facilities as background scenery, use of film, or videotape equipment or more than one studio camera are furnished to one candidate, they must be made available to opposing candidates. However, if a candidate pays extra for such facilities, his opponents also must pay for them.

(b) *Local or State candidate appearing on network program.* If a local or State candidate appears on a national network program, an opposing candidate is entitled to equal opportunities over the stations which carried the network program whose signals cover the area in which the local or State election is taking place.[128]

(c) *How much time for a candidate nominated by three parties?* If three political parties nominate A to the same office and only one party nominates B for the office, A and B are entitled to the same amount of time. Section 315 refers only to persons who are candidates for public office, not to political parties, and if time is made available to one candidate, equal opportunities must be afforded every other candidate for that office, regardless of how many party nominations the first may have received.[129]

(d) *Candidate enters primaries of two parties.* Candidate A entered both the Democratic and Republican primaries for mayor. His opponent in the Democratic primary, B, received half an hour of time, whereupon A demanded and received an equal amount of time. A's opponent in the Republican primary, C, then demanded and received half an hour, based on the fact that A, his opponent in the Republican primary, had received that amount of time. A thereafter requested another half hour of time to reply to C. He was not entitled to it. The same principle applied here as (c) above.[130]

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[123] *Id.* at 417.

[124] *Id.*

[125] *Id.*

[126] *Hon. Thomas E. Eagleton*, 81 FCC 2d 423 (1980).

[127] *D. L. Grace, Esq.*, 40 FCC 297 (1958).

[128] *Hon. Mike Monroney*, 40 FCC 251 (1952).

[129] *Greater Broadcasting Corp. of New York*, 40 FCC 253 (1946).

[130] *Lar Daly*, 40 FCC 302 (1959).

(e) *Candidates running for two offices at same time.* Under the laws of one State, a candidate may run simultaneously for two different offices and if elected to both, decide at that time which to accept. Candidate A runs for both governor and State senator. A station sells him time to advance his candidacy for governor and then receives a request for equal opportunites from other candidates for State senator. If must honor such requests and A will not be entitled to buy time to respond to their broadcasts as candidates for State senator. This decision was based on the same principles as those in (c) and (d) above.[131]

(g) *Buying network and local station time.* If a candidate buys advertising on a network program, what kind of a rate may affiliates of the network charge his opponent if the opponent seeks to buy time on individual affiliates? The Commission has stated that the rate charged an opposing candidate by an individual affiliated station need not be related to the rate charged by the network. The network rate is, in effect, a "package rate" for a certain number of stations which must be bought together, whereas a candidate who buys time on a single affiliate is buying less time and buying it under an arrangement which does not constitute a similar "package" deal. If the second candidate went to the network, it would be expected to sell him time at comparable network rates, but a single affiliate may charge the rate if normally would charge a candidate.[132]

(h) *45-Minute Program Equals How Many Spots?* Candidate A conducted an interview program (which was not an exempt news interview program under Section 315(a)(2)) on a station from 8:15 to 9:00 p.m., five nights a week. He also broadcast commercial announcements in which he was not identified by name between midnight and 5 a.m. Candidate B, A's opponent, requested (i) that the station remove A from the air; (ii) and that she be given "equal time" in the form of announcements of short duration which would occupy a total amount of time each week equal to that occupied by A's 45-minute nightly broadcasts and the commercial announcements he broadcast. The station offered Candidate B (i) either an opportunity to be co-host with A on A's program or to conduct a similar program of her own from 11:15 to midnight five nights a week and (ii) a sixth 45-minute program to be broadcast at 11:15 p.m., on Saturday to offset the commercial announcements broadcast by A each week. Candidate B refused the offer and complained to the Commission. The Commission stated that it had no authority under the Communications Act to order the station to remove A from the air, particularly in view of Section 326 of the Act which prohibits censorship of broadcast programs by the Commission. As to the other matters: (i) both kinds of appearances by A were "uses," since his voice was well known and readily recognizable on the commercial announcements; (ii) the "take-it-or-leave-it" offer by the station of only 45-minute programs at times specified by the station was not an offer of equal opportunities; (iii) Candidate B's demand for a sufficient number of one-minute spots each week to equal the total time occupied by A in all of his appearances was a demand for more than equal opportunities, since that number of spots was considerably more valuable than A's 45-minute programs (three times as costly, in fact, under the station's rate card). The Commission directed both parties to undertake good faith negotiations "governed by a rule of reason." (Nothing further was heard from either party.)[133]

"Last Minute" Use of Time

60. Many questions have arisen based on one candidate's use of time shortly before election day, when it is presumed more valuable than time used early in the campaign. For example, Candidate A buys time and uses most of it during the early stages of the campaign.

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[131] *Station KATC*, 31 FCC 2d 403 (1971).

[132] *Mullins Broadcasting Co.*, 24 FCC 2d 264 (1970). For a discussion of rates generally and the "lowest unit charge" amendment to Section 315 enacted in 1972, see "Rates Which May Be Charged Candidates" beginning with paragraph 65.

[133] *RKO General, Inc.*, 25 FCC 2d 117 (1970).

Candidate B makes a request for equal opportunities within seven days of A's first appearance and the request also applies to all subsequent broadcasts by A. However, the time that B buys is used only during the last week of the campaign. Candidate A then requests additional time during the last week on the grounds that B's appearances so near to election day will give him more than equal opportunities. Is A entitled to additional time? There is no fixed standard for determining the rights of candidates in this respect, nor can there be, in view of the many different situations that may arise. However, as the Commission stated in one case, "It must be obvious that, to take the extreme case, a candidate cannot use Section 315 of the Act to delay his request for time and expect the 'equal opportunities' provision of that section to give him the right to saturate preelection broadcast time."[134] In another case, involving interpretation of the "seven-day rule,"[135] the Commission cited the *Hunter* case and said that "even if timely requests have been made by a candidate under the rule, a licensee may be called upon to exercise reasonable judgment in affording 'equal opportunities,' particularly where there has been an accumulation of time"[136] In still another case, the Commission held that a request by a candidate six days before election day to buy time equal to that used by his opponent during the preceding seven days and still to be used by his opponent before the election should have been honored by the station under the equal opportunities requirement, but a different conclusion might have been warranted "had the complainant waited until the last day or two before the election."[137] In another case, a station announced a policy of selling only three prime-time spots per week to candidates for nomination to the office of major. Candidate A bought three spots per week for the final five weeks of the campaign. Candidate B made a timely request for equal opportunities but later claimed he could not produce his spots on time and was allowed to use fifteen prime time sports in the last two weeks of the campaign. Candidate A complained that B had been afforded more than equal opportunities. A asked to buy six more spots in the last two weeks of the campaign. The Commission ruled that A was entitled to buy the extra spots since he had relied upon the station's announced policy of limiting prime time spots to three per week and the station had failed to enforce that policy.[138]

Censorship; Other Restrictions on Candidates

61. Section 315(a) of the Communications Act prohibits censorship by a broadcaster of any "use" of the station by a legally qualified candidate for public office. A station not only cannot censor a candidate, it cannot censor anything said or shown by anyone else on a program in which a candidate appears to the extent that it becomes a "use." The U.S. Supreme Court has held that since stations are not allowed to control what candidates say or do on these programs, the stations cannot be held liable for damages in civil lawsuits for libel. Recently, however, a specific question has arisen over whether the no-censorship provision of Section 315 is intended to override the proscription against the broadcast of obscene material contained in Section 1464 of the Federal Criminal Code.

Examples of Censorship of Candidates

62. Examples of practices that have been ruled to violate the no-censorship law include the following:

(a) *Refusing to broadcast a candidate because of libelous material.* A station may not refuse to broadcast a candidate's program on the ground that it contains libelous remarks, even though no opposing candidates have made broadcasts. If a station invites a candidate to appear or agrees to broadcast his program or accepts his order for time, it may not cancel the program because it believes the proposed material to be libelous, because this would amount to censorship.[139]

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[134] *Hon. Allen Oakley Hunter*, 40 FCC 246 (1952).

[135] See "The 'Seven Day Rule'" beginning in paragraph 78.

[136] *Emerson Stone, Jr.*, 40 F.C.C. 385 (1964).

[137] *Summa Corp. (KLAS-TV)*, 49 F.C.C. 2d 443 (1974).

[138] *William R. Singer*, 51 F.C.C. 2d 766 (1975).

(b) *Material that is "vulgar" or "in bad taste."* A station may not reject or change a candidate's material on the grounds that it is "vulgar" or "in bad taste."[140]

(c) *Possible incitement to racial violence.* A station may not reject a candidate's material on the grounds that it is likely to incite racial hatred and might even lead to violence, so long as "there does not appear to be that clear and present danger of imminent violence which might warrant interfering with speech which does not contain any direct incitement to violence.[141]

(d) *Candidate who does not discuss his candidacy.* A candidate may not be refused time on the grounds that he plans to discuss subjects other than his candidacy.[142] An invitation to a candidate to speak may not be conditioned on his limiting his remarks to a certain subject.[143]

(e) *Candidate who wants to discuss his candidacy.* A station may not limit a candidate to discussion of non-partisan subjects on the grounds that the candidate's opponent limited his appearance to such subjects. A candidate may use a station's facilities as he wishes.[144]

(f) *No requirement that candidate appear "live."* A station may not require a candidate to appear "live" rather than by film or video recording.[145] The same principle applies in reverse: A station may not require a candidate to appear on tape of film if he wants to appear "live." However, if the station customarily charges extra for the production of live performances, it may charge a candidate on the same basis.

(g) *Submitting script or tape in advance.* A candidate may not be required to submit a script or tape in advance for the purpose of reviewing its contents for possible censorship. However, see 63(d) below for the reasons why scripts or tapes may be required in advance.

(h) *Noncommercial TV stations and "campaign film"* Noncommercial TV stations have the same rights as commercial stations to decide initially how much time to make available to a candidate, but they may not reject a candidate's program on the basis of its content or on the grounds that it "was originally produced for use on commercial television stations [and is a] five minute campaign film." Noncommercial stations are not exempt from the no-censorship provision of Section 315.[146]

(i) *Restricting program or spot to candidate's personal appearance.* A station may not insist that a candidate be the sole person taking part in a program or political spot or that he appear continuously throughout the program or spot along with other people.[147]

Cases Where There Is No Censorship Violation

63. Examples of cases in which the Commission or the courts found there was no violation of the no-censorship provision of Section 315(a) include the following:

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[139] *Port Huron Broadcasting Co.*, 12 FCC 1069 (1948); *WDSU Broadcasting Corporation*, 16 FCC 345 (1951).

[140] *Ms. Gloria Sage*, 62 FCC 2d 135 (1976); rev. den'd, 83 FCC 2d 148 (1977); *Western Connecticut Broadcasting Co.*, 43 FCC 2d 730 (1973).

[141] *Atlanta NAACP*, 36 FCC 2d 635, 637 (1972).

[142] *WMCA, Inc.*, 40 FCC 241 (1952).

[143] *WANV, Inc.*, 50 FCC 2d 177 (1974); forfeiture affirmed, 54 FCC 2d 432 (1975).

[144] *Hon. Allen Oakley Hunter*, 40 FCC 246 (1952).

[145] *WOR-TV*, 22 FCC 2d 528 (1969).

[146] *Public Broadcasting Council of Central New York, Inc., et al.*, January 24, 1977. (The FCC's original ruling in this case was dated October 27, 1976 (FCC 76-1005).)

[147] *Gray Communications Systems Inc.*, 14 FCC 2d 766 (1968); reconsid. denied, 19 FCC 2d 532 (1969).

(a) *Rejection of spots that are not "uses" by candidates.* If a candidate or his organization buys time but the candidate's voice or picture does not appear on the spots, a station may use its judgment on whether to broadcast or reject the spots if it believes they are inaccurate, unfair, libelous, etc.—provided that the station is acting in good faith.[148]

(b) *Appearance on an exempt news program.* The no-censorship restriction in Section 315 applies only to "uses" of stations by candidates. Therefore, stations may edit or delete statements by, or pictures of, candidates in any of the four types of news programs that Section 315(a) says are not uses.

(c) *Offering candidates time for debate.* Offering the only two candidates for an office time for a debate is not censorship by means of dictating format of program, because the offer is contingent on acceptance by both candidates, and either or both may reject it.[149]

(d) *When a script or tape may be requested in advance.* A station is not allowed to require that a tape or text of a candidate's proposed "use" be submitted in advance of broadcast if the purpose is to review its contents for "suitability," 'good taste," "accuracy," "libel" or any other basis for possible censorship. However, a broadcaster may ask for an advance script or tape for the limited purpose of complying with the law; for example, (i) to learn whether the candidate himself will take part in the broadcast so as to make it a use and, therefore, subject to the "equal opportunities," "no-censorship," and possibly the "lowest unit charge" provisions of Section 315; (ii) if it is a paid appearance, to learn whether it carries proper sponsorship identification; (iii) to learn whether the program or spot is longer or shorter than it is represented to be, which not only will affect the station's scheduling but may affect its obligations toward opposing candidates in granting them equal opportunities and the "lowest unit charge" or "comparable rates." If a broadcaster does ask for a script or tape in advance, he should explain clearly that the request is made only for the limited purposes outlined above and that he is prohibited from censoring the content of the proposed spot or program. If the candidate answers by stating that he has no tape or script and plans to ad-lib, he must be allowed to do so, but the broadcaster may warn him that the spot or program, if sponsored, must include: (i) proper sponsorship identification within the agreed broadcast period; and (ii) that if the program appears to be about to run longer, the broadcaster reserves the right to stop carrying the broadcast sufficiently far in advance of the end of the agreed time period to insert sponsorship identification on the broadcaster's own initiative. Even if a spot or program will not be ad-libbed, a candidate may refuse to submit the tape or text in advance. In that event, he should be given the same advance notice as the ad-libbing candidate about sponsorship identification and length of program time.

(e) *Reply to personal attack on candidate or to political editorial.* If a station broadcasts a personal attack which is not exempt from the personal attack rule on a legally qualified candidate for public office, it need not offer him an opportunity to reply personally because if it did so, his opponents would be entitled to "equal opportunities," which would mean equal time to use as they saw fit. However, the candidate "should, of course, be given a substantial voice in the selection of a spokesman to respond to such attack."[150] The same principle applies when a broadcaster editorializes against, or in favor of, a candidate. The rules require that an offer be made of a reasonable opportunity "for a candidate *or a spokesman of the candidate* to respond. . . ." (Emphasis added.)[151]

(f) *Rejection of Spot that Does Not Comply with FCC Technical Standards.* Where a licensee does not accept ads from commercial advertisers that do not comply with FCC technical standards and has not obtained a waiver of those standards, it is not required to accept nonconforming commercials from political candidates; even if those commercials constitute a use, because such refusal would not constitute censorship of content, but would be for the limited purpose of complying with the law.[152]

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[148] *Patton Echols*, 43 FCC 2d 479 (1973); rev. den'd, 43 FCC 2d 1121 (1973); see also, *Felix* v. *Westinghouse Radio Stations* 186 F.2d 1 (3d Cir. 1950); cert. denied, 341 U.S. 909 (1951).

[149] *Letter to Station WANV*, October 30, 1975.

[150] *Times-Mirror Broadcasting Co.*, 40 FCC 538, 539 (1962).

[151] See section on the personal attack and political editorializing rules, paragraphs 85 to 88.

(g) In a memorandum prepared for members of Congress who had made inquiries, the Commission's staff concluded that the prohibition against censorship in Section 315 did not apply to the broadcast of obscene material that is proscribed by Section 1464 of the Criminal Code. In addition, legislation has been introduced in both Houses of Congress that would amend the no-censorship provision of Section 315 so as to not require the broadcast of any material which the broadcaster reasonably believes would violate any criminal law of the United States.

Liability for Libel or Defamation Actions

64. A broadcast is immune from liability for damages in civil actions based on libel or defamation if the basis for the suit is something said or done by a candidate during a "use" of the station, since Section 315 generally prohibits the station from censoring a candidate.[153] In the opinion of the FCC, the same immunity would apply to statements made by noncandidates on a program in which the candidate takes part so as to make it a "use."[154] However, if the candidate himself does not take part in a program, the broadcast is not a "use" and the station itself is liable.[155]

Rates Which May be Charged Candidates

65. The rate that a station is allowed to charge a political candidate depends in part on how near to election day the candidate's broadcasts will be made. If they fall within 45 days of primary election or within 60 days of a general election, the most that a station may charge is its "lowest unit charge . . . for the same class and amount of time for the same period." For example, if a TV station, charges $1,000 for a single prime time 60-second spot on Saturday nights, but reduces this rate for commercial advertisers to $750 a spot if they buy at least 100 spots, then it must sell a candidate a prime-time Saturday night 60-second spot for $750 even if he buys only one. On the other hand, if the candidate's spots are broadcast earlier than the 45 or 60 day period, he may be charged the same rate as a commercial advertiser; if he buys only one spot he has to pay the one-spot rate of $1,000. Section 315(b) of the Communications Act contains these provisions. The Commission's rules interpreting Section 315 require that all candidates for the same office be charged the same rates and that, even outside the 45 and 60-day periods, a candidate may be charged no more than the station would charge a commercial advertiser which is promoting its business in the same area as that in which the candidate is running for office. All statutes and rules need interpretation. The following paragraphs take up the most important and frequently asked questions about rates for political candidates.

What Rates Apply to What Candidates?

66. Section 315(b) should be read carefully to learn when and how the rate restrictions apply:

(a) *They apply only to legally qualified candidates.* See paragraphs 8 to 28 and the definitions of legally qualified candidates in the rules for explanations of the term "legally qualified candidate." The Commission believes Congress meant to apply the lowest unit charge "only in situations where an election is being held in the service area of the station on which time is being purchased." Thus, a candidate for a party's Presidential nomination would be able to buy time at this rate in a State in which the primary was to be held within 45 days and in which the candidate had either qualified for a position on the primary ballot or had made a substantial showing of being a write-in candidate. However, if the primary already has been held in a State (and he is seeking to buy time in that State prior to the nominating convention of his party), he is not entitled to the lowest unit charge in that State, nor in a State in which the delegates to the national nominating convention are chosen by a State convention.[156] (The citation is to the original Primer on the lowest unit rate. It will be referred to, hereafter, in this section as *"Public Notice."*)

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[152] *Christopher J. Reynolds, Esq.*, 69 FCC 2d 941 (1978).

[153] *Farmers Educational and Cooperative Union of America* v. *WDAY, Inc.*, 360 U.S. 525 (1959).

[154] *Gray Communications Systems, Inc.*, 14 FCC 2d 766 (1968).

[155] *See Felix* v. *Westinghouse* cited in (2)(a) above.

(b) *The rates apply only to "uses" of stations by candidates.* A "use" is an appearance on the air by a candidate personally. However, there are exceptions and qualifications to this simple definition. See paragraphs 31 to 52 for information on what is and is not a "use."[157]

(c) *They apply only to "uses" in connection with a political campaign.* Section 315(b) states that the limitations on rates for candidates apply when a candidate uses his time "in connection with this campaign for nomination for election, or election . . . ." Congress evidently did not want to make the lowest unit rate available to a candidate who also is a department store owner who wants to use his time to advertise a current sale at the store rather than to promote his candidacy.

(d) *"Lowest unit charge" applies only to candidates for election.* The language of Section 315(b)(1) about the "lowest unit charge" refers only to the 45 days preceding a "primary or primary runoff *election* and . . . the 60 days preceding the date of a general or special *election* . . . ." (Emphasis added.) It does not apply the "lowest unit charge" to persons who are candidates for nomination by a party convention or caucus.[158] However, where the caucus system for choosing delegates involves public participation, the caucus functions as a primary election. Thus, the candidates being voted for in the caucus are entitled to lowest unit charge 45 days prior to the caucus.[159]

(e) *"Comparable use" rates apply to pre-convention candidates.* Section 315(b)(2), which states "at any other time" candidates may be charged more than other time buyers would pay for "comparable use" of the station, does not mention primary or general elections, so the Commission interprets it as applying at all times to persons who seek nomination by a party convention or caucus—as well as applying to pre-primary and pre-election candidates outside of the 45 and 60-day periods.[160]

(f) *Rates apply to networks as well as stations.* The rate restrictions apply to networks as well as to individual stations, since networks are, in effect, selling time on behalf of their affiliated stations. This also means that the compensation an affiliate receives from a network for carrying a sponsored network program will not be considered in computing the affiliate's "lowest unit charge" for direct sales to candidates. This principle applies to "non-wired networks" like Keystone as well as to interconnected networks like ABC, CBS, NBC, and MBS.[161]

(g) *Rate restrictions do not apply to production charges.* The "lowest unit charge" applies only to time sales. It does not apply to charges normally made by a station for other services, such as use of a television studio, audio or videotaping, or line charges and remote technical crew charges when the broadcast originates outside the station. The "lowest unit charge" also does not apply to any additional charges that may be made if a candidate buys full sponsorship of an existing program for which there is an established *program* charge in addition to a time charge.[162]

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[156] *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 531-532 (1972).

[157] For an example of "non-uses," see *Sig Rogich (KVOV)*, 48 2d 230 (1974).

[158] *Public Notice*, 34 FCC 2d 510, 523 (1972).

[159] *Reagan for President Committee*, 80 FCC 2d 225 (1980), *recon. denied*, 19 FCC 2d 212 (1980).

[160] *Public Notice*, 34 FCC 2d 510, 523 (1972).

[161] *Public Notice*, 34 FCC 2d 510, 525-27 (1972); *Robert L. Olender*, 61 FCC 2d 694 (1976).

(h) *Per-Inquiry Advertising.* The lowest unit charge provision does not apply to per inquiry advertising, since the amount paid to the station for such advertisements cannot be determined in advance, "is based upon the number of responses it receives from its audience," and is therefore outside the control of the broadcaster.[163]

Lowest Unit Charge

67. Section 315(b)(1) refers to "the lowest unit charge of the station for the same class and amount of time for the same period . . . ." The following definitions of these terms and examples of the ways in which the lowest unit charge is to be computed and applied are based on the Commission's 1972 Public Notice on this subject cited above, unless otherwise indicated:

(a) *What does "class" of time mean?* It refers to the kinds of rates that most radio and TV stations have, such as rates for fixed-position spots, preemptible spots, run-of-schedule spots, and special discount packages.

(b) *What is the "amount" of time?* This terms refers to the length of the period purchased, such as 30 seconds, 60 seconds, 5 minutes of 1 hour.

(c) *What is the "same period?"* This term refers to the time of the broadcast day, such as prime time in TV, "drive time" in radio and Class A, Class B and other classifications of time which a station may establish for rate-making purposes.

(d) *What does "lowest unit charge" mean?* Briefly it means that candidates must be given all discounts, based on volume, frequency or any other factor, that are offered to the station's most favored commercial advertiser for the same class and amount of time for the same period, regardless of how few programs or spots the candidate buys. This includes discounted rates given to commercial advertisers but not published on the rate card. Following are some examples:

(i) A station sells one fixed-position one-minute announcement in prime time to commercial advertisers for $15. If an advertiser buys 500 spots, however, he pays only $5,000 or $10 each. If a candidate buys one spot he may not be charged more than $10.

(ii) A station sells one preemptible 30-second spot in drive time to commercial advertisers for $10. It sells 100 such spots for $750. It must sell one such spot to a candidate for no more than $7.50.

(iii) A station's lowest rate per spot for run-of-schedule one-minute spots is 1,000 for $1,000, but it charges $4 for a single run-of-schedule spot. It must sell one such spot to a candidate for not more than $1.

Several Commission rulings give examples of the application of the "lowest unit charge": *Eugene T. Smith*, 34 F.C.C. 2d 622 (1972); *Martin A. Blumenthal*, 34 F.C.C. 2d 828 (1972); *Waldron Broadcasting Corp. (WCIR-AM-FM)*, Notice of Apparent Liability for Forfeiture, 43 F.C.C. 2d 619 (1973); *Newhouse Broadcasting Corporation (WSYE-TV)*, Notice of Apparent Liability for Forfeiture released August 25, 1975; *Harbenito Radio Corporation (HGBT)*, 58 F.C.C. 2d 645 (1976); *WBGR*, 58 F.C.C. 980 (1976).

(e) *"Package plans."* If a station offers its advertisers a special package plan for buying spot announcements, it must make a similar plan available to political candidates and charge them proportionately. For example, Station XXXX offers a "Summer Special" 12 spot package consisting of three spots in morning "drive time," three during the midday period, three in afternoon "drive time" and three during the 7 to 11 p.m. evening hours—12 spots per day for a package price of $60, which is less than the cost of buying three spots in each of the four periods. Normally, six "drive time" spots would cost $48 and the other six spots (mid-day and evening) would cost $30. If a candidate seeks to buy the same package, he naturally will be entitled to buy it for $60. If he wishes to buy only four spots per day—one each in morning and afternoon "drive time" and one each during the mid-day and evening periods—he may buy them at a proportionate rate—in this case, one-third of $60 or $20. If he wishes to buy spots only in morning and afternoon "drive time", he must pay whatever the station's lowest unit charges to advertisers are for spots in these preferred periods. He is not entitled to pay at the same special low package rate unless he buys spots in all of the time periods specified in the package plan.

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[162] *Public Notice*, 34 FCC 2d 510, 530 (1972).

[163] *Robert B. Mckenna, Esq.*, 87 FCC 2d 1016 (1981).

Note: The foregoing does not apply to a "package" plan which consists only of spot announcements of the same class and amount of time for the same time period. Such plans are in reality volume discount plans discussed in paragraph (d) above.

(f) *"National" and "Local" rates.* Some stations charge lower rates to local merchants than to national advertisers. During the "lowest unit rate" period, a political candidate may not be charged more than the lowest rate of the station, regardless of whether it is the "national" or "local" rate and regardless of whether the candidate is running for local, county, State or national office. However, see paragraphs 69 and 70 about "comparable use" rates for different political offices when the lowest unit rate does not apply.

(g) *When "rate card" and rate actually charged are different.* Stations sometimes sell time to advertisers at less than the rate quoted on their rate cards. On the other hand, the rate card may show a special discounted "package" on "plan" which works out to a lower rate than the station has actually charged an advertiser during the 45 or 60-day period preceding a primary or general election. The Commission has ruled that whichever charge is lower (that on the rate card or that actually charged) is the one that must be used in computing "lowest unit charge" for candidates.

(h) *Advertising agency discount.* Stations usually allow advertising agency commissions to be taken out of the charges made for time. If they do, and if a candidate buys time through an agency, the station may include the usual agency commission in the lowest unit charge it makes to the candidate. However, if the candidate buys time directly from the station using an agency, the amount usually paid for agency commission must be deducted from the lowest unit charge. For example, if the lowest rate for a one-minute spot is $100 and the agency commission is 15 percent or $15, a candidate buying time through an agency must pay $100, but if the candidate places the spot directly, without use of an agency, he pays only $85. However, a candidate buying time directly must furnish his advertisement or other program matter to the station unless it is the policy of the station to prepare the material for commercial advertisers without charge in such non-agency situations.

Note: The foregoing applies to "commissionable" rates. If the station's rates are "net to the station" any advertising agency commission is added to the net rate. Regardless of whether commissionable or net rates are used, the determination of the lowest unit charge is based on the amount that a station actually receives for paid advertising.

(i) *Station representative commissions.* Most stations contract with "station representative" firms to represent them in selling to national or regional advertisers. The stations pay their "reps" a commissions on sales made for them. Unlike the situation in (h) above regarding advertising agencies, the commission paid to a sales representative need not be considered in computing the station's lowest unit charge. Such a representative is similar to a station's own sales staff, which frequently is paid on a commission basis, at least in part. Thus, a candidate who does not buy time through a sales representative is not entitled to a lower rate than one who does.[164]

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[164] *WPSD-TV*, 34 FCC 2d 828 (1972).

(j) *Rates for "legal notices."* The laws of some states fix the rate which stations may charge for broadcasting legal notices. This rate may be well below that charged other advertisers. The Commission has ruled that since rates for legal notices are set by statute rather than by the station, they are not to be used in calculating the lowest unit rate for candidates.

(k) *"Trade-out" and barter deals.* Stations sometimes trade time for the goods or services of commercial advertisers. The Commission has ruled that such "trade-out" or barter deals need not be considered in calculating a station's lowest unit rate. Only sales involving payment of money to the station need be considered.

(l) *Stations may charge candidates less than lowest unit rate, but must make the same rate available to all.* Section 315(b)(1) states that a station's rates during the 45- or 60-day period shall "not exceed" its lowest unit charge to other purchasers. It does not state that a station may not charge candidates a lower rate than other purchasers. However, if one candidate or group of candidates is given a lower rate, this in itself becomes the "lowest unit rate" and other candidates may not be charged more than this.[165]

(m) *Post-election restitution to candidates does not excuse overcharge.* A station charged a rate based on an agency commission, although no agency was involved. Later, it claimed it intended to "reconcile" all political accounts after the election. The Commission ruled that an "intention to make restitution . . . will not serve to excuse past violations.[166]

(n) *Free spots to non-profit organization that also buys spots.* Normally, if a station offers free "bonus" spots to an advertiser as an inducement to buy spots on the station, the bonus spots will be considered as sponsored and must be included in computing that station's charge for spots to the advertiser. Thus, if a station sells 10 spots at $10 each to an advertiser but promises him an additional 10 spots "free," the average price per spot for "lowest unit charge" purposes will be $5 instead of $10. However, when a station customarily provides additional free spots to non-profit organizations which may buy spots to advertise Christmas tree sales, concerts, etc., the free spots need not be averaged with the paid spots in arriving at the lowest unit rate.[167]

When Rates for Candidates Take Effect

68. The phrase "lowest unit charge of the station" in Section 315(b)(1) refers to the lowest unit charge to a station's most favored advertiser for broadcasts that are made during the 45 days preceding a primary election or the 60 days preceding a general election. If a station's lowest rate for a spot had been $10 but it increased the rate to $12 one week before the beginning of the 45 or 60 day period, the station could charge candidates $12 thereafter. However, if there was an indication that the station was changing its rate only temporarily so as to deprive candidates of their rights during the pre-election period, the Commission would investigate to determine whether the law was being evaded; if so, it would view the violation most seriously. Many other questions have arisen as to the rates on which a station may base its lowest unit charge and when the charges are effective. Examples of these are given below:

(a) *45 and 60-day periods refer to dates of broadcasts.* If a candidate signs a contract on the 70th day before a general election, covering the purchase of time for broadcasts within the 60 days before the election, he is entitled to the lowest unit rate, regardless of the date of the contract. However, if some of his announcements are to be broadcast between the 70th and the 60th day before the election, the station need not change its lowest unit rate for these particular spots. It is the date or dates of broadcasts that are important in applying the lowest unit charge.

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[165] *Letter to Robert A. Marmet, Esq.*, June 2, 1977.

[166] *Turner Communications Corporation*, 54 FCC 2d 1129 (1975); affirmed in reduced amount, February 19, 1976; see, also, *KAYS, Inc.*, 43 FCC 2d 1183 (1973).

[167] *Allan R. Page (KGWA)*, 34 FCC 2d 1103 (1972); *Robert W. Sterling*, 48 FCC 2d 531 (1974).

(b) *Low charge to a single advertiser controls lowest unit rate.* A station may have had a contract with one advertiser over a period of many years at a rate less than that charged others who began advertising at a later date, after rate had been increased. Even though only one advertiser gets the special low rate, that rate is in the station's lowest, and the same charge must be made to a candidate for that class and amount of time for that period.[168] However, if the contract with the long-standing advertiser expires during a 45 to 60-day pre-election period and there is no intention ever to renew it at the low rate, the station may base its lowest unit charge after the contract expires on its charges for commercial advertisements still being broadcast.

(c) *Unsold time at special discount.* During the 60 days before a general election a station manager finds himself with a considerable amount of unsold time on a particular date. In order to obtain something rather than nothing for the time, he sells it at an extremely low rate on that day only. The Commission has ruled that this becomes the lowest unit charge not only for time sold to candidates thereafter but for time previously sold in that 60-day period, so that rebates must be made to candidates who have used that station prior to that date. This is because the manager could have made such a special offer, at his discretion, on any day of the 60-day period and because of the possibility of abuse by favoring commercial advertisers or one candidate over another.[169]

(d) *Rates may vary with days of the week.* If a station charges commercial advertisers more for a one-minute spot between 7:00 and 7:30 on one night of the week than on another night because of the higher rating or otherwise greater desirability of the period on that night, it may take that fact into account in computing its lowest unit charge to candidates for spots in that period on that night.[170]

(e) *Change in rates because of audience ratings.* Many television stations raise or lower their rates for spot announcements next to programs on the basis of new audience ratings in their markets. If a new rating shows that Program A now has a greater audience than before, and Program B a smaller audience, the station may increase its rate for spots adjacent to Program A and lower the rate for adjacencies to Program B. In such cases, candidates buying spots adjacent to Program A for broadcast after the rate change may be charged more after the change, and those buying adjacencies to Program B for broadcast after the rate change will be entitled to a lower "lowest unit rate" than before the rate change.[171]

(f) *Change from summer to winter rates.* Assume that the 60-day period preceding a general election begins on September 3. On September 20, as is its annual practice, a station changes from its lower "summer" rates to its higher "winter" rates. When this happens, the "lowest unit rate" between September 3rd and September 20 is based on the summer rate. From September 20 until election day, it is based on the winter rate.[172] However, there may be variations in these cases. Two examples follow:

(i) A station increases its rates on September 20 as stated above. Candidate A buys 50 fixed-position one-minute spots in prime time to be broadcast before the rate change takes effect. Candidate B is entitled to equal opportunities to respond under Section 315(a), and he buys 50 similar spots to be broadcast after the seasonal rate change. The situation here becomes different from the one described under (f) above, because "equal opportunity" requires that B be charged no more than his opponent A. Therefore, the rate charged B may not be greater than that charged A.

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[168] *Public Notice,* 34 FCC 2d 510, 528-29 (1972).

[169] *Public Notice,* 34 FCC 2d 510, 527 (1972).

[170] *Public Notice,* 34 FCC 2d 510, 524-25 (1972).

[171] *Public Notice,* 34 FCC 2d 510, 525 (1972).

[172] *Public Notice,* 34 FCC 2d 510, 525 (1972).

(ii) A station increases its rates because of the season on September 20. Candidate A has bought 50 fixed-position prime-time spots to be broadcast before the rate change. Candidate B wants to buy 100 spots to be broadcast after the seasonal rate change. He is entitled to buy 50 spots at the same rate as his opponent. If the station sells him another 50 spots, it may base its charge on the higher seasonal rate after September 20.[173]

(g) *If rate goes down after contract is signed, candidate gets lower rate.* Before the beginning of the 45-day period preceding a primary election, a candidate signs a contract for time to be used during the 45-day period. The price for the time is stated in the contract. After he signs it, and before his broadcasts begin, the station's rates change, either because it is switching from winter to summer rates or because of higher or lower audience ratings. If the changes in rates results in a lower unit charge than that specified in the contract, the candidate gets the benefit of the new lower rate, since it will be in effect during the 45-day period. However, if the new lowest unit charge is higher than that stated in the contract, the candidate gets the benefit of the rate quoted in the contract.[174]

Charges for "Comparable Use" of Stations

69. Except during the 45 days before a primary election and the 60 days before a general election, a station is allowed to charge a political candidate as much as it charges others for "comparable use" of the station. "Comparable use" means use of the same amount and class of time in the same period. For example, if a station's lowest rate to commercial advertisers for a one-minute announcement at 8 p.m. on Saturdays is $10 for one spot or $75 for ten spots, the station may charge a political candidate $10 for a single spot, and he or she must buy ten spots in order to get the reduced rate of $7.50 a spot. (He or she would have to pay only $7.50 for a single spot if it were broadcast during the 45 or 60-day pre-election period.)

Examples of How "Comparable Use" Rates Apply

70. Following are examples of ways in which the "comparable use" provision of Section 315(b)(2) of the Communications Act applies:

(a) *Time must be "used" by a legally qualified candidate.* Section 315(b) refers only to broadcasts by legally qualified candidates in which the candidates themselves take part. (See paragraphs 8 to 24 for definition of a legally qualified candidate and paragraphs 31 to 52 for information on what a "use" of a station is). Although Section 315(b) does not profit a station from charging higher than its regular commercial rates for political broadcasts that are not "uses," such charges might raise serious questions as to whether the station was serving the public interest. The U.S. Supreme Court and the Commission have stated that broadcasting discussion of important public issues is one of the most important services a station can perform, and both the Court and the Commission have recognized the special importance of political broadcasts. Trying to discourage them by discrimination in rates would not be consistent with this policy. (See discussion of "The Importance of Political Broadcasting" in Part I of the Primer.)

(b) *"National" and "Local" rates.* Some stations offer lower "local" rates to merchants who seek to attract customers from only the area near the city in which the station is located. They charge higher "national" rates to national advertisers which wish to reach the entire population. The Commission's rules recognize this difference for "comparable use" rates but not for "lowest unit rate." Thus, if a sponsored political program or spot is to be broadcast outside the 45 or 60 day pre-election period and the sponsor is a candidate for mayor of the city, a station which offers advertisers a "local" rate must offer the mayoral candidate the local rate because he or she is appealing to persons in the same area as local merchants who are given the "local" rate Section 73.1940(b)(2) of the rules states, in part:

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[173] *Public Notice,* 34 FCC 2d 510, 527-28 (1972).

[174] *Public Notice,* 34 FCC 2d 510, 529 (1972).

> A candidate shall be charged no more than the rate the station would charge if the candidate were a commercial advertiser whose advertising was directed to promoting its business within the same area as that encompassed by the particular office for which such person is a candidate.

On the other hand, if a candidate's district extends beyond the territory for which local rates are customarily charged, the station is allowed to charge him the "national" rate if it has one. The essential point is that the rates charged candidates be no higher than those charged others for "comparable use."

(c) *May a station charge less than "comparable" rates?* Section 315(b) merely sets an upper limit on what a station may charge candidates. The station may charge them less than commercial advertisers if it wishes.

(d) *30-minute and 5-minute rates.* A station charges $50 for a 30-minute time period, and $15 for a five-minute period. A candidate who has prepared only 5-minute recordings demands that the station sell him six separate 5-minute periods for the same price it charges for 30 minutes. The Commission has held that the station may refuse to do so, since the law does not require a station to sell time to candidates at lower rates than they charge commercial advertisers.[175]

(e) *Run-of-schedule spots.* A station customarily sold packages of "run-of-schedule" (ROS) spots to commercial advertisers at lower rates than those charged for fixed position spots. The run-of-schedule spots could be placed wherever the station wished and could be moved in order to make room for fixed position spots. The station refused to sell ROS spots to political candidates because it feared that if it sold them to Candidate A and one or more of his spots happened to fall within prime time, it also would have to sell ROS spots to A's opponent, B, and B might demand that an equal number of his ROS spots be broadcast in prime time. The Commission ruled that since the station sold ROS spots to commercial advertisers it must make them available to candidates. However, if some of A's spots happened to be broadcast in prime time, B would not be able to demand prime time for his ROS spots. He would have to take the same chances that A took. If B wanted to be assured of any particular time periods, he would have to pay the higher rate charged for fixed position spots. In selling ROS spots to candidates, station licensees are expected to act in good faith and follow normal procedures in scheduling the spots.[176] In another case,[177] it was held that all candidates, both local and federal, are entitled to buy ROS and preemptible spots when the station offers these types of commercials to other advertisers. In addition, ROS and preemptible spots were held to be both classes of time and discount privileges.

(f) *Preemptible spots.* Preemptible spots are sold at low rates on a "time available" basis. Although the purchase orders specify the times in which the spots are scheduled to be broadcast, a later purchaser of non-preemptible fixed position spots may preempt the time originally allocated to the preemptible spots. In that case, no charge is made for the originally scheduled preemptible spots. If a station normally sells preemptible spots to commercial advertisers, it must make them available to political candidates, but candidates buying them must take their chances on getting on the air. Thus, if Candidate A bought 10 preemptible spots and all of them actually were broadcast, and his opponent B later bought 10 preemptible spots which were not all broadcast, B would have to keep ordering preemptible spots until 10 of them actually were broadcast. If he wanted to make sure that each spot he bought was aired, he would have to buy non-preemptible spots at a higher rate.[178]

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[175] *William V. Rawlings*, 18 FCC 2d 746 (1969).

[176] *WFBG*, 23 FCC 2d 760 (1967).

[177] *State Senator William H. Hernstadt*, 79 FCC 2d 944 (1980), *review denied*, 84 FCC 2d 570 (1980), *rev'd, Hernstadt v. FCC*, 677 F.2d 893 (D.C. Cir. 1981).

[178] *WHDH, Inc.*, 23 FCC 2d 763 (1967).

(g) *A station raises its rates.* After Candidate A buys spots at $10 each, the station raises its rates to $15. Candidate B, who is A's opponent, then seeks to buy spots. He must be given the same rate that A paid. Section 73.1940(b)(2) of the rules states that "the rates, if any, charged all such candidates for the same office shall be uniform..."

(h) *Advertising agency commissions.* If a station normally pays a commission to an advertising agency for time purchased through the agency, it cannot refuse to pay a commission to an agency through which a candidate orders time; otherwise, a commercial advertiser would be favored over a candidate since it would receive the services of an agency merely by paying the station's established rate whereas a candidate would receive only broadcast time if he paid the same rate.[179] However, if a station has announced and followed a policy of refusing to pay agency commissions for local advertising and a candidate for local office seeks to buy time through an agency, the station need not pay an agency discount, since it will be following the same policy with respect to local commercial advertisers and candidates seeking local office.[180]

(i) *Candidate buys time on his own station.* A candidate owns a station personally or is the principal owner and president of the corporate licensee. He buys time on the station at its regular commercial rates, using his personal funds to pay the station for it. If, thereafter, an opposing candidate seeks time on the station, it may charge him the same rate that its owner paid for time. The Commission stated, "The fact that you have a financial interest in the corporate licensee does not affect the licensee's obligation under the act. Thus, the rates which the licensee may charge to other legally qualified candidates will be governed by the rate which you actually pay to the licensee. If no charge is made to you, it follows that other legally qualified candidates are entitled to equal time without charge."[181] However, in these circumstances, the candidate-owner should enter the payment to the station on the station's books so that it will be subject to income tax and be included in the annual financial report to the Commission. Also, the Commission has stated that "where the licensee, or a principal of the licensee, is also the candidate, there is special obligation upon the licensee to insure fair dealing....[182]

(j) *Candidate uses own advertising agency.* A candidate buys time through an advertising/public relations agency which he heads and whose profit he shares. The Commission was asked if the usual 15 percent agency commission would be considered a rebate or "kick-back" to the candidate. The FCC stated that it would not be so construed since "the Commission has no rule or regulation which would prevent or forbid him from using the services of his own advertising agency. The fact that he may ultimately share in a portion of the proceeds of the transaction is not inconsistent with the statute or our rules."[183]

(k) *Candidate buys time for debate with opponent.* A committee for a candidate buys time and the candidate offers to debate his principal opponent in the purchased period. The opponent agrees if all other candidates also are invited to debate. All are invited, but only one accepts. He takes part in a second debate in time paid for by the committee of the first candidate. The other candidates who did not participate in the debates would not be entitled to free time. Rather, "equal opportunities" would entitle them only to time they or their supporters paid for.[184]

(l) *Candidate uses some of bulk time-purchaser's spots.* A station normally charges $2 per spot but if 100 or more are contracted for the rate is $1. A candidate arranges with a commercial advertiser which bought more than 100 spots to use five of its spots at $1 each.

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[179] *KNOE-TV*, 40 FCC 388 (1964).

[180] *KSEE*, 23 F.C.C. 2d 762 (1968).

[181] *WKOA*, 40 FCC 288 (1957).

[182] *Emerson Stone, Jr.*, 40 F.C.C. 385, 386 (1964).

[183] *Jason L. Shrinsky*, 23 FCC 2d 770 (1966); *KTRM*, 40 F.C.C. 331 (1962).

[184] *KTVU-TV*, 23 FCC 2d 757 (1967).

The candidate's opponents would be entitled to the same low rate since the rates charged all candidates for the same office must be uniform.[185]

(m) *Group of candidates buys block of time.* A group of candidates for different offices pool their resources to buy a block of time at a discount. An individual candidate opposing one member of the group seeks to buy time on the station. The FCC ruled that candidates must be treated individually and that the individual candidate was entitled to be charged the same discount rate as his opponent, since the provisions of Section 315 run to the candidates themselves.[186]

Recent Cases

71. Most of the original rulings on rates for "comparable use" of stations cited above date back a number of years. However, the Commission has followed the same principles in ruling on more recent cases, including the following: *KAHU,* Notice of Apparent Liability for Forfeiture, 71-959 (charging candidates higher rates than commercial advertisers): *Waldron Broadcasting Corp.* Notice of Apparent Liability for Forfeiture, 43 FCC 2d 619 (1973) (charging one candidate more than his opponent and charging candidates more than lowest unit charge); *Newhouse Broadcasting Corporation,* Notice of Apparent Liability for Forfeiture, August 26, 1975 (charging candidates higher rates than commercial advertisers and charging one candidate a higher rate than his opponent); *Letter to KFAR,* April 6, 1977 (admonition for charging candidates for the same office different rates and charging some more than the lowest unit rate).

How Much Time Must a Station Provide?

72. Political broadcasting is recognized by the Commission, the Congress and the U.S. Supreme Court as one of the most important services a station can provide to the public. The Commission has stated that it is one of the major elements of a station's service "because of the contribution broadcasting can make to an informed electorate—in turn so vital to the proper functioning of our Republic.[187]

Congress amended Section 312(a) of the Communications Act in 1972 to give the Commission authority to revoke a station license for:

> . . .willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for use of the broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

This does not exempt stations from making time available to candidates for non-Federal offices such as Governor, State legislator, mayor or city councilman. Stations are expected to devote time to campaigns of State and local candidates in proportion to the significance of the campaigns and the amount of public interest in them. However, the law does not require stations to permit access to candidates for *every* non-Federal office, whereas it does require them to permit access to all candidates for Federal office if the candidates request it.[188]

Regardless of whether candidates are for Federal or non-Federal office, a station may not refuse all requests for time simply because they do not fit into the station's particular format. For example, a station that normally broadcasts only music and spot announcements will not be meeting its obligations if it refuses to accept or schedule any political discussion running longer than one minute.[189]

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[185] *Hon. Mike Monroney,* 40 FCC 252 (1952).

[186] *Political Broadcast Rates,* 40 FCC 1975 (1954).

[187] *Licensee Responsibility as to Political Broadcasts,* 15 FCC 2d 94 (1968); see, also, *Farmers Educational and Cooperative Union of America v. WDAY, Inc.,* 360 U.S. 525 (1959); *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission,* 395 U.S. 367-94 (1969).

[188] *Mr Warren J. Moity, Sr.,* 88 FCC 2d 580 (1979) review denied FCC 2d (FCC 80-438).

Reasonable Access for Federal Candidates

73. Like all general terms, "reasonable access" needs some sort of a definition so candidates and broadcasters will know their rights and obligations. It cannot be defined exactly, however, because what is reasonable for station A may not be reasonable for station B. Suppose that station A is a powerful New York City station whose signal covers an area including parts of three States in which there are at least six Senatorial candidates in the current election campaign, plus scores of Congressional candidates in dozens of districts and hundreds of State and local candidates. On the other hand, station B is in a sparsely populated area, and the only Federal candidate within range of its signal are two candidates for one U.S. Senate seat and two candidates in each of two Congressional districts—a total of six Federal candidates. Also, there are few State and local races in the station's area during the period of the current national campaign. A station with as few candidates to accommodate as B would be expected to provide more access to Federal candidates than A. However, the Commission has stated:

> Congress clearly did not intend, to take the extreme case, that during the closing days of the campaign, stations should be required to accommodate requests for political time to the exclusion of all or most other types of programming or advertising. Important as an informed electorate is in our society, there are other elements in the public interest standard, and the public is entitled to other kinds of programming than political. It was not intended that all or most time be preempted for political broadcasts. The foregoing appears to be the only definite statement that may be made about the new section, since no all-embracing standard can be set. The test of whether a licensee has met the requirement of the new section is one of reasonableness. The Commission will not substitute its judgment for that of the licensee but, rather, it will determine in any case that may arise whether the licensee can be said to have acted reasonably and in good faith in fulfilling his obligations under this section.
>
> We are aware of the fact that a myriad of situations can arise that will present difficult problems. One conceivable method of trying to act reasonably and in good faith might be for licensees, prior to an election campaign for Federal offices, to meet with candidates in an effort to work out the problem of reasonable access for them on their stations. Such conferences might cover, among other things, the subjects of the amount of time that the station proposes to sell or give candidates, the amount of types of its other programming. . .[190]

Thus, "reasonable access" for Federal candidates will depend on a number of factors, as will be explained in the following paragraphs. First, however, the reader should note that under Section 312(a)(7) of the Act the reasonable access requirement applies only to:

(a) *Uses* of stations by candidates themselves. See paragraph 31 for definition of a "use."
(b) Uses of stations by *legally qualified candidates* for Federal elective office. See paragraphs 8-28 for definitions of legally qualified candidates.

The reader also should note that the law does not require a station to provide time free. It says the station either must provide reasonable access free or "permit purchase of reasonable amounts of time." Thus, if a station gives away enough time to a candidate to amount to "reasonable access" under the circumstances of the case, it is not required to sell time to the candidate, and if it sells the candidate "reasonable amounts" it need not provide free time.[191]

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[189] *Licensee Responsibilities as to Political Broadcasts,* 15 FCC 2d 94 (1968).

[190] *Public Notice, Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 536 (1972).

Principles To Be Followed In Applying Statute

74. On July 12, 1978, the Commission adopted a *Report and Order* clarifying its policy in enforcing Section 312(a)(7).[192] The document reaffirmed the Commission's policy of relying "generally on the reasonable, good faith judgments of licensees as to what constitutes reasonable access under all of the circumstances present in particular cases." (par. 55). It stated, however, that in deciding whether a licensee's judgments on this subject can be considered reasonable, the Commission will follow these general principles:

(a) Reasonable access must be provided to Federal elective candidates through the gift or sale of time for "uses" of the station by legally qualified candidates for public office.

(b) Reasonable access must be provided at least during the 45 days before a primary and the 60 days before a general or special election. The question of whether access should be afforded before these periods begin and when access should apply before a convention or caucus will be determined by the Commission on a case-by-case basis.

(c) Both commercial and noncommercial educational stations must make available program time during prime-time periods unless unusual circumstances exist. The Commission has recognized that there may be situations where the number of candidates in a Federal election may make it possible for a station to make prime-time program time available, and the Commission will continue to make exceptions to the prime-time program time policy where circumstances dictate. ("Prime time" for purposes of enforcement of the reasonable access statute means the part or parts of the day in which the audience is likely to be largest. For TV, the 7-11 p.m. period is recognized as prime time in the Eastern and Pacific time zones, and the 6-10 p.m. period in the Central and Mountain time zones. For radio, prime time usually means "drive time," the periods when most persons are driving to or from work.)

(d) Commercial stations must make prime-time spot announcements available to Federal candidates. However, even though a noncommercial educational station may normally broadcast spot promotional or public service announcements, it generally need not make those spot times available to political candidates. If a commercial station chooses to donate rather than sell time to candidates, it must make available to Federal candidates under the reasonable access statute free spot time of the various lengths, classes and periods which are available to commercial advertisers.

(e) Licensees may not adopt a policy that flatly bans Federal candidates from access to the types, lengths and classes of time which they sell to commercial advertisers. Noncommercial educational stations need provide Federal candidates only with lengths of program time which are normal parts of the station's broadcast schedule (but see (d) above re: spot time).

(f) In view of the fact that Section 315(a) prohibits censorship of the material that a candidate uses during a personal appearance, noncommercial broadcasters may not reject material submitted by candidates merely on the basis that it was originally prepared for broadcast on a commercial station.

(g) Although both educational and commercial licensees may suggest the format for appearances by candidates who exercise their Section 312(a)(7) rights, candidates need not accept these suggestions and may not be penalized by loss of "equal opportunities" if they decline to appear on programs designed by the broadcasters.

("Classes of time" means such kinds as fixed-position spots, preemptible spots, run-of-schedule spots, and special discount packages.) The Commission stated, however, that a Federal candidate "is not entitled to a particular placement of his or her announcement on a station's broadcast schedule." It recognized that this would be very difficult if a candidate wanted his or her spot placed next to a highly rated program that was broadcast only once, or very rarely and if opposing candidates demanded "equal opportunities," Also, some stations do not sell time to candidates during newscasts.[193]

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[191] *Dennis J. Morrisseau (WCAX-TV)*, 48 FCC 2d 436 (1974).

[192] *Report and Order in the Matter of Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC 2d 1079 (1978).

In its *Report and Order*, the Commission also ruled that subscription TV stations need not make access available to Federal candidates during periods of time in which they are engaged in subscription TV programming.

Carter/Mondale

75. In a case of major significance,[194] the complainant (Carter/Mondale Reelection Committee) alleged that the three major television networks had denied reasonable access to President Carter in violation of Section 312(a)(7). It stated that it had attempted to purchase one prime-time, 30-minute program slot for early December 1979 and was unreasonably refused. According to Carter/Mondale, the desired time was to be aired in connection with President Carter's formal announcement of his candidacy and was designed to set the tone for his entire campaign. Generally, the networks, in declining the requested access, informed Carter/Mondale that it was too early in the presidential race for the sales of such amounts of time. However, CBS did offer to sell five minutes in prime time and five minutes in daytime.

The Commission found each network had acted unreasonably and directed them to advise the Commission of their intentions regarding compliance with Section 312(a)(7).

The Court of Appeals affirmed the Commission's orders, holding that the statute created a new affirmative right of access to the broadcast media for individual candidates for federal elective office, once the campaign is in "full swing." In responding to a candidate's request for time a broadcaster must weigh such factors as:

(a) the individual needs of the candidate, as expressed by the candidate;
(b) the amount of time previously provided to the candidate;
(c) potential disruption of regular programming;
(d) the number of other candidates likely to invoke equal opportunity rights if the broadcaster grants the request before him; and
(e) the timing of the request.

The U.S. Supreme Court affirmed, holding that Section 312(a)(7) focuses on the individual 'legally qualified candidate' seeking air time to advocate '*his candidacy*,' and guarantees him 'reasonable access' enforceable by specific governmental sanction." The Court further noted that the sanction may be imposed for "willful *or* repeated" failure to afford reasonable access.

To justify a negative response, the Court said, broadcasters would have to show "a realistic danger of substantial program disruption—perhaps caused by insufficient notice to allow adjustments in the schedule—or of an excessive number of equal time requests." The Court noted that the Commission does not set the starting date for a campaign. Rather, it examines the objective evidence to find whether the campaign has already begun, considering the positions of both the candidates and the networks as well as other factors.

Time for State and Local Candidates

76. As explained at the beginning of this section, the law does not require stations to provide access to every State, county, and local candidate. However, the Commission, the courts, and Congress have recognized that political broadcasting is one of the most important

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[193] *Anthony R. Martin-Trigona; appeal dismissed, Anthony R. Martin-Trigona*, FCC 78-109 (March 2, 1978).

[194] *Carter/Mondale Presidential Committee, Inc.*, 74 FCC 2d 631 (1979), *recon. denied*, 74 FCC 2d 657 (1979), *aff'd sub. nom. CBS Inc. v. FCC*, 629 F. 2d 1 (D.C. Cir. 1980), *aff'd*, 453 U.S. 367 (1981).

services that a station can provide to the public. Therefore, stations are expected to allocate reasonable amounts of time to other political races, based on the licensee's judgment of the importance of the races and the amount of public interest in them.

Examples of Rulings in Non-Federal Campaigns

77. Following are some examples of ways in which the Commission has applied Section 315 to non-Federal political candidates:

(a) *Station need not sell time at all if it gives time.* Even when a station decides a race is important enough to justify presentation of the candidates on the air, it need not sell time to them if it makes time available without charge.[195]

(b) *Station can limit sale of time to certain races.* A station may use its judgment as to which races are most significant and of greatest interest to the public, and refuse to sell or give time for "uses" of the station by candidates for other offices.[196]

(c) *Need not sell time far in advance of election or accept particular format.* A station need not sell time many months in advance of an election or accept a particular length of paid announcement that a candidate wishes to use.[197]

(d) *Need not sell a specific period of time.* Neither the Act nor the Commission's rules require a station to sell specific periods of time for political broadcasts.[198]

(e) *Need not sell less than 5 minutes to candidate.* A station which plans to make program time free to candidates in major races and to give "in depth" reports on news programs on these candidates is justified in exercising its judgment that the public interest will be better served by paid political appearances of five minutes or more.[199]

The "Seven-Day Rule"

78. The so-called "seven-day rule" (Section 73.1940(e) of the broadcasting rules) is as follows:

> *Time of request.* A request for equal opportunities must be submitted to the licensee within 1 week of the day on which the first prior use, giving rise to the right of equal opportunities, occurred: *Provided, however,* That where a person was not a candidate at the time of such first prior use, he shall submit his request within 1 week of the first subsequent use after he has become a legally qualified candidate for the office in question.

79. The basic thrust of the rule is clear: a candidate who wants equal opportunities must make his request within one week of the day on which his opponent made his broadcast.[200] Thus, if candidate A has been making broadcasts on a station for five weeks and his opponent B does not request equal opportunities until the end of the fifth week, B is entitled only to the amount of time that A has used during the fifth week. The Commission adopted this rule so broadcasters could make advance plans for allocating time to candidates during political campaigns, and to make sure that one candidate does not "lie in the bushes" until a day or two

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[195] *Rockefeller for Governor Campaign, (WAJR)* 59 FCC 2d 646 (1976); *Charles O. Porter, Esq.*, 35 FCC 2d 664 (1972).

[196] *Foster Furcolo (WCVB-TV)*, 48 FCC 2d 565 (1974); *Lew Breyer*, 31 FCC 2d 548 (1968).

[197] *Dan Walker (WMAQ)*, 57 FCC 2d 799 (1975).

[198] *W. Roy Smith*, 18 FCC 2d 747 (1969).

[199] *Louis Rosenbush, Jr. (WBAL-TV)*, 31 FCC 2d 782 (1971).

[200] As has been explained elsewhere in this Primer, a station is not required to notify a candidate that his opponent has asked for or obtained time. The station must keep a public file showing which candidates have requested either free or paid time and what the station did about the request, but it is up to the candidates to keep themselves informed by this or other means about what their opponents have done.

before election and then gain an unfair advantage over his opportunity by getting a block of last-minute time equal to all of the time his opponent used during the whole campaign. However, the way the rule works out is not always as simple as the example above.

Rule Applies Only to "Uses" by Legally Qualified Candidates

80. The rule applies only to persons who are legally qualified candidates for public office at the time of the broadcast in question. For example, if A makes a broadcast *before* he becomes a legally qualified candidate and B is a legally qualified candidate at the time of A's broadcast, A's broadcast gives B no equal opportunity rights, no matter how soon he requests time from the station. On the same principle, if Smith is a legally qualified candidate when he makes a broadcast on August 1 but Jones does not become a legally qualified candidate for the same office until August 2, Smith's August 1 broadcast gives Jones no right to equal opportunities. However, if Smith should then make a second broadcast on August 3, Jones can obtain equal opportunities based on Smith's August 3 broadcast if Jones makes his request within one week of August 3. See the part of the rule beginning *"Provided."*[201]

Multiple Candidates for the Same Office

81. The first sentence of the rule says that a "request" for equal opportunities must be submitted within 1 week of the day on which the first prior use, giving right to equal opportunities, occurred . . ." An important word in that sentence is "first." Here's an example, As of August 1, A, B and C all are legally qualified candidates for the same public office. A makes a broadcast on August 1. On August 5, B asks the station to make equal opportunities available to him because of A's broadcast. The station agrees, but B does not use his time until August 15. On August 10, C makes a request for equal opportunities, claiming that his request should be granted because it was made within seven days of B's request. The station rightly denies C's request because the seven-day rule is not based on a time a request is made by another candidate. It is based on the date the time is used by another candidate, and here C did not make his request until 10 days after A's use. Moreover, if C had waited until after B's broadcast of August 15, and made another request on August 16 based on B's August 15 broadcast, he would not be entitled to equal opportunities, because he was a candidate on August 1, the date of the "*first* prior use" and he did not submit his request by August 8. The Commission has recognized the fact that the "seven-day rule" would have little meaning if each use based on a prior use were allowed to trigger still another grant of equal opportunities so that such requests could go on and on. Here C was a legally qualified candidate when A made his original broadcast on August 1, and C could have exercised his rights by making a request within one week of that date. On the other hand, as pointed out in paragraph 80, if C had not been a legally qualified candidate on August 1, but became one by the date of B's broadcast of August 15, then C could have made a valid request at any time within 1 week of August 15, since he would be submitting "his request within 1 week of the first subsequent use after he became a legally qualified candidate for the office in question."

Requests Made Before Opponent's Use

82. A and B are legally qualified candidates for the same office and it is announced that A is going to speak on a station on September 15. On September 12, B requests equal opportunities based on the fact that his opponent is going to speak. The Commission has ruled that such as advance request is valid "if it is directed to a specific future Section 315 use which was then known or announced prior to the actual broadcast.[202] (Other portions of the ruling in that case are no longer valid because the seven-day rule was amended in 1970). The Commission also has ruled that "where a licensee allows a candidate to use his facilities in a fixed and continuing pattern (as, for example, through the sale of a number of spot

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[201] Also, see *Hon. Joseph S. Clark*, 40 F.C.C. 332 (1962).

[202] *Socialist Workers Party*, 15 FCC 2d 96, 97 (1968).

announcements to be broadcast over a specified period of time), a Section 315 request from an opposing candidate in reference thereto gives the licensee notice that equal opportunities are requested as to all uses in the 7-day period prior to the request and all subsequent uses pursuant to the preestablished schedule."[203]

When Station Erroneously Denies First Request

83. Candidate A requested equal opportunities based on appearances by his opponent within the past seven days. The licensee agreed, but put restrictions on the way in which A could use his time which the Commission found to be unreasonable. Between the time A filed his complaint with the Commission and the time the Commission ruled on it, A's opponent made still more broadcasts on the station, but didn't request equal opportunities within seven days of each broadcast. The Commission ruled (i) A was within his rights in refusing to appear on the program under the station's proposed restrictions and was entitled to use the station's facilities as he had originally planned; (ii) since the filing of the complaint with the FCC made the stations aware that if the complaint were found valid, A would be entitled to the time he had requested. A was not required to keep making weekly demands for equal opportunities; (iii) A was entitled to all of the time used by his opponent since A filed his first request with the station.[204]

84. A, who was part owner and president of several stations in Texas, became a candidate for Democratic Senatorial nomination. He wrote his opponent, B, that A was using a certain amount of time daily on his stations and that B was "entitled to equal time, at no charge." B wrote back about two weeks later, thanking A for advising him "of the accumulation of time" on A's stations and stating that A would be notified when B decided to start using the accumulated time. About six weeks later, B requested time equal to all that A had used. A replied that the seven-day rule applied and B was entitled only to the time used during the week preceding receipt of B's second letter. The Commission ruled in this unusual case that, having offered B time and learned from B's first response that B misunderstood A's offer and assumed he would be allowed to accumulate time beyond one week, A should have notified B at the time that B's impression was mistaken. When a licensee is also a candidate, there is a special obligation on him to ensure fair dealings. B's first letter constituted a notification that B wished to avail himself of equal opportunities and if A had wishes, he could at that time have made reasonable scheduling plans. However, the Commission added that the seven-day rule was not the only thing to be taken into account, and that "even if timely requests have been made by a candidate under the rule, a licensee may be called upon to exercise reasonable judgment in affording 'equal opportunities,' particularly where there has been an accumulation of time." The Commission said "the licensee and the candidate should confer, and attempt to work out in good faith, reasonable solutions to the time problems presented in the case."[205]

Political Editorials; Personal Attacks

85. The rules on political editorials and personal attacks do not forbid the broadcast of either.[206] Instead, they require broadcasters who carry such editorials or attacks to offer the persons adversely affected by them a chance to state their side of the case in person or through a spokesman.

Political Editorial Rule

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[203] *KLAS-TV*, 42 FCC 2d 894, 896-897 (1973).

[204] *Gray Communications Systems, Inc.*, 14 FCC 2d 766, 767 (1968); reconsideration denied, 19 FCC 2d 532 (1969).

[205] *Emerson Stone, Jr.*, 40 FCC 385, 387 (1964).

[206] The personal attack rule is found in §73.1920. The political editorial rule is found in §73.1930.

86. The FCC receives many more complaints about political editorials than about personal attacks in connection with political campaigns. Therefore, most of this section deals with the editorializing part of the rule, which states:

> 73.1930. Where a licensee, in an editorial, (1) endorses or (2) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial, (a) notification of the date and the time of the editorial; (b) a script or tape of the editorial; and (c) an offer of a reasonable opportunity for candidate or spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

Note that a candidate is not necessarily entitled to respond in person. If he did respond personally, his opponent or opponents in the campaign would be entitled to "equal opportunities" under Section 315(a) of the Act, and since they could not be censored, they could use their "equal time" in any way they chose. This is why the broadcaster is given the alternative of offering time for a spokesman of the candidate to respond, but in adopting this rule the Commission stated that "Barring extraordinary circumstances, the choice of the spokesman is, of course, a matter for the candidate involved."[207] Examples of the Commission's interpretation of other parts of the rule follows:

(a) *What is a station editorial?* Basically, a station editorial is a statement representing the view of the licensee of the station, such as its owner, a principal officer, the manager, or another employee if he is permitted by the licensee to speak for the station. Even if a statement is not labeled an editorial, it may be one. For example, on the day before the primary elections the president and controlling stockholder of a station endorsed several candidates during an interview with him broadcast by his station. The station president claimed later that his statements about the candidates represented only his personal feelings and were not an editorial endorsement of candidates by the station itself. The Commission stated that "when the president and controlling stockholder of a licensee . . . endorses candidates for public office, such endorsements are indistinguishable from a station editorial within the meaning of [the political editorializing rule]."[208] In another case, all three stations in a city broadcast an identical item in their newscasts on the day before an election. The item stated that the managers of all three stations had endorsed the same candidates in the next day's election. Two of the station managers had broadcast endorsements of these same candidates at an earlier date and at that time had complied with the requirements of the editorializing rule as to notifying other candidates, etc., but the endorsement by the third manager was not announced until the "news item" was broadcast just before the election day. The Commission ruled that the broadcast of the announcement of the endorsement by all three managers was in effect the broadcast of a new political editorial, and that the candidates not endorsed should have been notified in advance.[209] On the other hand, a statement of an employee or commentator of a station is not a station editorial unless it is represented to be one.[210]

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[207] *In the Matter of Amendment of Part 73 of the Rules,* 8 FCC 2d 721, 727 (1967).

[208] *Richard A. Karr (WJOB),* 32 FCC 2d 285 (1971); see also, *Port Jervis Broadcasting Co.* (forfeiture order) June 24, 1976; application in mitigation or remission denied, March 14, 1977.

[209] *KSLY, KATY, KVEC* (Notice of Apparent Liability for Forfeiture), May 31, 1973, FCC 73-594.

(b) "*72-hour rule.*" In the cases cited above, the stations did not comply with the requirement that if a political editorial is broadcast within 7 hours of election day, notice must be given to the candidates opposed or not endorsed in the editorial sufficiently far in advance for them to "have a reasonable opportunity to prepare a response and to present it in a timely fashion." In still another case, the station broadcast an endorsement of one candidate on the day before the election and then telephoned the opposing candidates and offered them a chance to respond. This was a violation of the rule, since the notification was not given "in advance of the broadcast."[211] The same ruling was made in a case where the station broadcast an endorsement of one candidate twice on the same day before election and once on election day and wrote the other candidate a letter offering him a chance to respond, but the letter was not even mailed until election day.[212]

(c) "*Reasonable opportunity to respond.*" There can be no single definition of what is a reasonable offer of an opportunity to respond to a political editorial, because the reasonableness of the opportunity may vary with the circumstances, as the Commission noted on p. 727 of its Order adopting the rule, cited above. The Commission stated that "In many instances a comparable opportunity in time and scheduling will be clearly appropriate; in others, such as where the endorsement of a candidate is one of many and involves just a few seconds, a 'reasonable opportunity' may require more than a few seconds if there is to be a meaningful response." Thus, if a station's editorial stated merely that it believed that the following candidates were best qualified for election to the city council and then listed 20 persons, the entire editorial might be less than a minute long, but a "reasonable opportunity" for a response by any of the candidates who were not endorsed certainly would require more than one-twentieth of the time occupied by the editorial. In a specific case, the Commission found that the station had not given a candidate a reasonable opportunity to respond when it devoted 25 lines of script to endorsing his two opponents and opposing him, and offered him the equivalent of six lines for his responses.[213] The Commission ruled that reasonable opportunity had been offered in another case, where the station had broadcast a one-minute editorial opposing a candidate's election at 6:25 and 10:25 p.m. on October 28 and then offered the candidate five minutes for a response to be broadcast at 10:25 p.m. on election eve, November 5. The Commission said it could not find the offer of five minutes on election eve compared to two earlier one-minute editorials to be unreasonable.[214]

(d) *When does an editorial endorse or oppose a candidate?* If an editorial simply urges the election of one candidate to a certain office or recommends that the public vote against another candidate, there is no question as to whether the editorial falls within the scope of the rule. However, all cases have not been this clear, as illustrated by the following three:

(i) Two of the five members of the Board of Town Commissioners were running for reelection. Without identifying any candidate by name, a station broadcast editorials criticizing the current Board and urging the public to vote for "a change." The Commission ruled that even though the two Board members seeking reelection were not named, the editorial was in effect a statement of the station licensee's opposition to their candidacies and therefore, was a political editorial under the rules.[215]

(ii) During the second week before an election, station editorials referred to the fact that a State Senator announced that he would introduce legislation to create a commission to investigate corruption in government. Without referring to the election or the fact that the State Senator was a candidate for reelection, the editorial praised the idea of creating such a commission. The Senator's campaign workers distributed a campaign flier on which the editorial was printed, along with the station's logotype. The station broadcast a disclaimer of the flier three times, stating that use of its logo was unauthorized and that the station had a policy of not endorsing individual candidates. It also wrote to the Senator demanding that he stop using its trademark. The Senator's opponent claimed that the need for strengthened ethics legislation for state officials was a principal issue in his campaign, and that the station's editorial was interpreted by some persons as an endorsement of the Senator. The station denied that the editorial endorsed him or even inferentially advocated his election. The Commission ruled that although the favorable reference to the Senator's proposal "could arguably and with some logic be viewed as an endorsement . . . [t]o apply our political editorializing rules in these situations—where no clear-cut endorsement of a candidacy is involved, would make little practical or legal sense . . . [i]nstead of encouraging 'uninhibited, robust and wide-open debate' . . . the effect of our ruling would be to inhibit it."[216]

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[210] *Accuracy in Media, Inc.*, 45 FCC 2d 297 (1973); *Letter to Edward L. Fanning,* December 3, 1975.

[211] *WKIK*, 43 FCC 2d 593 (1973).

[212] *Black River Radio,* 28 FCC 2d 337 (1971).

[213] *Dolph Pettey Broadcasting Co. (KUDE),* 30 FCC 2d 675 (1971).

[214] *William J. Dodd (KATC-TV),* 32 FCC 2d 545 (1971).

[215] *Bel Air Broadcasting Co., Inc.* 47 FCC 2d 985 (1974).

(iii) A county prosecuting attorney was a candidate for Democratic nomination for governor. The day before the primary, a station broadcast an editorial six times, strongly criticizing the candidate's record as a prosecutor but making no mention of the primary election for governor or the fact that he was a candidate in it. The licensee of the station denied that the editorial was one opposing the prosecutor's candidacy for governor. The station acknowledged, however, that the prosecutor's record was a controversial issue with "political implications" and that the broadcaster had been aware of the "political significance of the editorial." The Commission ruled that the editorial was a political one opposing the prosecutor's candidacy for governor, because the station took "a partisan position on a politically significant issue which is readily and clearly identified with a legally qualified candidate." The editorial "inferentially . . . challenged the qualifications of this official to obtain nomination as his party's Gubernatorial candidate." Also, "The editorial was broadcast on election eve, even though . . . the issue was one of public concern long before . . ."[217] The Commission found a difference between this and the *Stephen M. Slavin* case above in that the editorial in this case dealt with the candidate's "capacity to function as a public official," whereas in the *Slavin* case "it was the need for legislation to control government corruption that the station sought to endorse, not the candidacy of Senator Berning *per se*." The Commission noted, as another distinction, the fact that in the *Slavin* case the station had broadcast denials that an endorsement had been intended.

Personal Attacks

87. Since there are exceptions in the personal attack rule for attacks by candidates and their campaign associates against other candidates and their associates, as well as attacks on anyone that occur during "uses" of stations by candidates, complaints do not arise very often in political campaigns about violation of this rule. However, attacks sometimes take place which do not come within the exemptions, as will be discussed briefly below. The personal attack rule, is found in §73.1920. It is as follows:

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked:
(1) Notification of the date, time and identification of the broadcast;

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[216] *Stephen M. Slavin*, 45 FCC 2d 639, 641-42 (1973).

[217] *Taft Broadcasting Co.*, 53 FCC 2d 126, 132, 133 (1975).

(2) A script or tape (or an accurate summary if a script or tape is not available) of the attack; and
(3) An offer of a reasonable opportunity to respond over the licensee's facilities.
(b) The provisions of paragraph (a) of this Section shall not apply to broadcast material which falls within one or more of the following categories;
(1) Personal attacks on foreign groups or foreign public figures;
(2) Personal attacks occurring during uses by legally qualified candidates;
(3) Personal attacks made during broadcasts not included in (b)(2) and made by legally qualified candidates, their authorized spokespersons, or those associated with them in the campaign, on other such candidates, their authorized spokespersons or persons associated with the candidates in the campaign; and
(4) Bona fide newscasts, bona fide news interviews, and on-the-spot coverage of bona fide news events, including commentary or analysis contained in the foregoing programs.
(c) The provisions of paragraph (a) of this Section shall be applicable to editorials of the licensee, except in the case of non-commercial educational stations since they are precluded from editorializing (Section 399(a), Communications Act).

Note that the rule applies only to attacks on "the honesty, character, integrity or like personal qualities of an identified person or group." Criticism of a person's ability or intelligence is not a personal attack for purposes of the rule. The attack must be upon his honesty, character, integrity or similar qualities involving moral turpitude. Thus, saying that a legislator is ignorant and always votes the wrong way is not a personal attack under the rule, but saying that he has taken a bribe for his vote is a personal attack. In order for the rule to apply, the attack must be made during the discussion of a controversial issue of public importance. Finally, the rule not only exempts attacks by candidates and their associates on other candidates and their associates; it also exempts all attacks that occur during "uses" by candidates and all attacks made during newscasts, news interviews and on-the-spot coverage of news events. The news exemption includes commentary or analysis when it is broadcast in an exempt news program. However, station editorials and news documentaries are not exempt.

Examples of Personal Attack Rulings

88. The personal attack rule is a part of the Fairness Doctrine. A few illustrations of the way the rule applies to political campaigns are given below:

(a) *Candidate himself need not be given response time.* If a personal attack on a candidate is broadcast, the station can comply with the rule by providing time for response by a spokesman for the candidate rather than the candidate himself. If the candidate himself appeared, he would be making a "use" of the station and under Section 315(a) of the Act his opponents would be entitled to equal opportunities. Although the personal attack rule does not state specifically that time for a candidate's spokesman will be sufficient (as does the editorializing rule), the Commission made this clear when it adopted both rules.[218]
(b) *"Mental Gymnastics" charge is not an attack.* A station accused a candidate of "strange mental gymnastics" because he and other county supervisors had voted for a bond issue to enlarge the county government's office space on the grounds that more space was needed, but at about the same time gave free space in the county building to a U.S. Senator from that state. The Commission found that the station licensee had not been unreasonable in deciding that no personal attack had been made "because the editorial questioned the wisdom of the supervisors' positions and not their honesty, character or integrity."[219]

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[218] *In the Matter of Amendment of Part 73 of the Rules*, 8 FCC 2d 721 (1967).
[219] *John B. Walsh (KOGO-TV)*, 31 FCC 2d 726, 727 (1971).

(c) *"Garrulous grand dame" reference not a personal attack.* A station referred to a local woman as "the garrulous grand dame of Billings radio talk shows" and "pistol packing momma." The object of these remarks alleged a personal attack that might have affected an election. The Commission refused to find the station wrong in denying that a personal attack was made. It said, "The statements do not appear to allege either a deliberate falsehood or to question your character or integrity."[220]

(d) *Honesty and integrity.* A station broadcast charges that a candidate's "veracity leaves something to be desired" and that his "constituents had best assess his integrity or lack of it." This is the *Port Jervis Broadcasting Company* case cited in paragraph 86(a). The Commission imposed a forfeiture on the licensee for violation of the "72-hour rule" for political editorials. The broadcasts also were personal attacks on the candidate, since they questioned his veracity and his integrity.

The Fairness Doctrine in Political Broadcasting

89. Some people think that the Fairness Doctrine is the same as the so-called "equal time" law, which is explained above under the heading "What Are 'Equal Opportunities'?" Actually, the Fairness Doctrine is quite different. First, it deals with controversial public *issues,* whereas the equal opportunities law as set forth in Section 315(a) of the Communications Act refers to *persons* (that is, candidates). Second, the Fairness Doctrine does not require "equal time" for contrasting views on a controversial issue. All it requires is (i) that the broadcaster devote a reasonable amount of time to the discussion of the most important issues in his area and (ii) that if he presents one side of such an issue, he give reasonable opportunity for presenting contrasting views on that issue. He need not present contrasting views in a single broadcast, or even the same series of broadcasts, provided he presents them somewhere in his overall programming. Thus, if a station presents an editorial favoring one side of an issue or a person favoring that side, it need not present a specific "countereditorial" or any particular person to give the opposing viewpoint, as long as it presents contrasting views elsewhere in its overall programming. The licensee of the station is given discretion to choose the issues to be discussed, the program formats to be used and the persons who will present the contrasting views. The Commission will review the licensee's decision only to decide if they were reasonable and made in good faith.[221]

90. There are two exceptions to the statement above that a station need not present any particular person to give "the other side" of an issue. These two exceptions are covered by Commission rules which deal with political editorializing and personal attacks.

91. Although most inquiries and complaints in political campaigns concern appearances by candidates themselves which are "uses" of stations, to which the Fairness Doctrine does not apply, there are some situations to which it does apply, as explained in the following paragraphs.

Fairness Doctrine Examples

92. The following are some specific examples of how the Fairness Doctrine does or does not apply to political campaigns:

(a) *It does not apply to "uses" by candidates.* The Fairness Doctrine does not apply to "uses" of broadcast stations by legally qualified candidates for public office. The Commission has stated:

> In Section 315(a), Congress has specified that equal opportunities shall be applicable to legally qualified candidates and that *in other instances* "fairness" be applicable—that is, that there be afforded ". . . reasonable opportunity for the discussion of

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[220] *Mrs. Frank Diesz (KOOK-TV),* 27 FCC 2d 859 (1971).

[221] *Fairness Report,* 48 FCC 2d 1 (1974).

conflicting viewpoints on issues of public importance."[222] [Emphasis added.] This policy was recently affirmed by the Commission in a rulemaking proceeding which also amended the personal attack rule so as to exempt attacks made during "uses" by legally qualified candidates.[223]

(b) *It does apply to news coverage of candidates.* The Fairness Doctrine applies to appearances by candidates on programs which are not "uses" of a station, as listed in Section 315(a) of the Act and in paragraphs 38 to 39 of this Primer. It also applies to news coverage of candidates in general. The controversial public issue in a political race is who among the competing candidates for nomination or election to an office should be chosen. The individual candidates represent "contrasting viewpoints" on the overall issue of which should be elected, rather than each candidate being a controversial issue himself. Therefore, under the Fairness Doctrine a broadcaster is called upon to make a reasonable, good faith judgment on the significance of a particular candidate on this basis to decide how much coverage should be given to his candidacy and campaign activities. The broadcaster is not required to give as much coverage to "fringe" party candidates as major party candidates.[224]

In one case, a minor party candidate received 14 minutes in news coverage or in exempt personal appearances, compared to 40 minutes for each of the two major party candidates. The Commission found this reasonable in view of the small vote polled by the minor party's candidate in that district in the previous election.[225]

(c) *Praise or criticism of candidates by commentator.* When an employee of a station, such as a commentator, criticizes a candidate or praises his opponent, the Fairness Doctrine comes into play.[226]

(d) *Purchase of time by Independent Committee.* A Committee which registered with the Federal Election Commission as an "independent expenditure committee" sought to buy time on several stations to broadcast advertisements opposing the election of a senatorial candidate. Three stations refused to broadcast the spots citing a policy of rejecting paid ads that present one side of a controversial issue of public importance. The Commission ruled that the Committee was not entitled to reasonable access, equal opportunities, or quasi-equal opportunities.[227]

The "Zapple Doctrine"

93. The Commission applies the Fairness Doctrine in a special way to one kind of political situation—that is, where Candidate A or his supporters buy time in which to support A or criticize his opponent, but A does not appear on the broadcast in person. If supporters of Candidate B then seek to buy a comparable amount of time they will be entitled to do so although the Fairness Doctrine does not usually require comparable amounts of time for contrasting views on an issue. Similarly, if A's supporters have obtained free time, B's supporters must be given free time if they ask for it. Although in this situation the candidates themselves would not appear and the broadcasts would not be "uses," the Commission

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[222] *First Fairness Report*, 36 FCC 2d 40, 47 (1972); see also, *Gloria W. Sage (WHEN-TV)* 62 FCC 2d 136 (1976).

[223] *Report and Order*, 44 Fed Reg 45951 (1979).

[224] *Lawrence L.C. Smith*, 40 FCC 549 (1963); *Ms. Penny Manes*, 38 FCC 2d 308 (1972); reconsideration denied, 42 FCC 2d 878 (1973); *Robin Ficker*, 65 FCC 2d 657 (1977); *American Independent Party and Eugene McCarthy*, 62 FCC 2d 4 (1976); *U.S. Labor Party* 57 FCC 2d 1273 (1976).

[225] *Harvey Michelman (WNBC-TV)*, 38 FCC 2d 374 (1972).

[226] *Richard K. Kelly, Jr.*, 40 FCC 2d 415 (1973).

[227] *You Can't Afford Dodd Committee*, 78 FCC 2d 658 (1980), *review denied*, 81 FCC 2d 579 (1980).

recognizes that such broadcasts are in "the political arena" and that a "quasi-equal opportunities" situation arises to which the Fairness Doctrine should be applied in a way that has approximately the same result as the equal opportunities requirement for appearances by candidates themselves.[228] The Commission has stated that the so-called "Zapple Doctrine" is "a particularization of what the public interest calls for in certain political broadcast situations. . ." It also has explained that this policy applies only to major political parties.[229]

In a recent ruling the Commission emphasized that *Zapple* is limited to formal campaign periods. Thus, it only applies where there are legally qualified candidates, and reflects the intent of Congress to confine special treatment of political discussion to distinct, identifiable periods. Political discussion outside of campaign periods would be subject to general Fairness Doctrine principles. Any other interpretation would create the anomalous result of supporters having greater rights than the candidates themselves.[230]

94. The Commission has ruled that the *Zapple* Doctrine does *not* apply to appearances of candidate supporters on the categories of bona fide news programming which are exempt from Section 315 requirements. The determination of whether news programming is bona fide depends upon the broadcaster's intent, not the intent of the candidate chosen for news coverage.[231]

Identifying Sponsor of Broadcast

95. Section 317 of the Communications Act states that when a station is paid to broadcast anything, the station must announce that the broadcast is paid for, and who paid for it. The announcement must be made at the time the program is broadcast. The law applies to paid political broadcasts as well as to other sponsored programs and spots. The sponsorship identification rules are in §73.1212. There have been many misunderstandings of what the Act and the rules require in sponsorship identification.

96. Examples of how the sponsorship identification requirements apply to political broadcasts follows:

(a) Merely stating that "The following is a paid political announcement" does not comply, because it doesn't say *who* paid for it.
(b) Merely adding a statement at the end of a spot or program that says, "Authority, Blank Campaign Committee, John Smith, Treasurer" does not comply because it doesn't say that *anyone* paid for it.
(c) Giving the sponsorship identification in such small type on television that the average viewer cannot read it, or leaving it on the screen too briefly to be read, does not comply because in neither case is the public informed that the program or spot is paid for and by whom.[232]
(d) *Advertising for or against a ballot proposition.* The Fairness Doctrine applies to ballot advertising, which ensures that the public will not be left uninformed as to such ballot issues. The Commission will not intervene in cases alleging false and misleading statements regarding controversial issues of public importance. Each licensee may exercise its own judgment on such issues. Intervention by the Commission, where false and misleading statements are alleged in such cases, might create the impression that the Commission is advocating one viewpoint or attempting to judge the truth or falsity of material being

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[228] *Nicholas Zapple*, 23 FCC 2d 707 (1970).

[229] *First Fairness Report*, 36 FCC 2d 40, 47-50 (1972).

[230] *Gaylord Broadcasting Co.*, ________ FCC 2d ________, (FCC 83-528, November 17, 1983).

[231] *Democratic National Committee*, 91 FCC 2d 1170 (1982).

[232] *Application of Sponsorship Identification Rules to Political Broadcasts*, 66 FCC 2d 302 (1977).

broadcast on either side of a currently controversial issue—a position which would be inappropriate for the government licensing agency.[233]

(e) An announcement that was paid for by a candidate which said that the candidate was providing free taxi service to take anyone to the polls "to vote for the candidate of your choice" should have been announced as paid for, even though the licensee of the station considered the announcements "nonpolitical."[234]

(f) A station broadcasts a list of candidates for various local public offices without revealing that the list was not complete or that the candidates named on the list had paid the station to include them. The Commission ruled that this was a violation of the sponsorship identification requirement.[235]

(g) Announcements for a candidate ended as follows: "Paid for by a Lot of People Who Want to See Sam Grossman Elected to the United States Senate." Although "A Lot of People", etc. was the actual name of the committee that paid for the spots, the Commission ruled that this language did not comply with the sponsorship identification statute and rule because it did not achieve the basic purpose behind the sponsorship identification requirements, which is that the public is entitled to know by whom it is being persuaded. The language used here "was so general that it did not convey to listeners and viewers the fact that the announcements were sponsored by a specific entity, i.e., a committee supporting Mr. Grossman's candidacy."[236]

(h) If a station customarily computes the time needed for sponsorship identification as part of the time purchased by a commercial advertiser, it is allowed to follow the same practice with paid political programs or announcements. Thus, stations which require that a one-minute commercial advertising spot include sponsorship identification within the one minute that was paid for may make the same requirements for paid political announcement or program.

(i) Although Section 317 of the Communications Act uses the phrase "paid for," the Commission's rules state that "sponsored" will be considered to have the same meaning. Section 73.1212(a)(1).

Material Furnished Free

97. Section 73.1212(d) of the rules requires that when any "film, record, transcription, talent, script or other material or service of any kind is furnished. . .as an inducement for broadcasting. . .any political broadcast matter [or matter dealing with a controversial public issue]. . .an announcement shall be made both at the beginning and conclusion of such broadcast. . ." that the film record, etc. "has been furnished in connection with transmission of such. . .matter." (Only one announcement, either at the beginning or end of the broadcast, is required if the program is no more than five minutes long.) This rule means, of course, that even if someone doesn't pay for the *time* in which some kinds of material are broadcast, the station must announce that he furnished the material if he did so. This applies not only to political candidates furnishing recordings, film, videotapes, etc., but to anyone's furnishing them if they deal either with political subjects or controversial public issues. The Commission has ruled that an announcement is necessary that program materials has been furnished to a station not only when a party Congressional committee furnishes previously prepared film or audiotape of statements of Congressmen to stations, but when the committee only makes available to the station a camera or sound recording crew so that a representative of the station himself can conduct an interview with a Congressional member of the party.[237] When members of Congress furnish stations with their weekly or monthly taped or filmed reports to their constituents, the same requirement exists that the station announce that the material

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[233] *Honorable Ronald Reagan*, 33 FCC 2d 314 (1972).

[234] *Letter to Station WBFN*, July 9, 1976.

[235] *Starkville Broadcasting Co.*, 45 FCC 2d 201 (1974).

[236] *Station KOOL-TV*, 26 FCC 2d 42 (1970).

[237] *Gary M. Sukow*, 36 FCC 2d 668 (1972).

was furnished to it by the Congressman. Instead of sending tape or film of their comments on political or controversial issues to stations, some public officials and other persons retain the taped messages in their offices, but set up telephone playback systems whereby a broadcaster dialing a certain number can receive by telephone the pre-recorded statement of the official or other persons for simultaneous or delayed broadcast. The same principle applies to this arrangement as to the *Sukow* case above, since the person is furnishing a "service" to a station as an inducement to broadcast his material. However, Congress has indicated that no announcement need be given when mere mimeographed or printed press releases are furnished to stations.

FCC and FEC Regulations are Different

98. Different laws govern the Federal Communications Commission and the Federal Election Commission. The Communications Act applies to licensees of broadcast stations. Section 317 of that Act requires that *stations* broadcast sponsorship identification announcements of the kinds discussed above. On the other hand, the Federal Election Campaign Act and the FEC rules apply to *candidates*, their committees and other buying political broadcast time. The announcements required by the FECA are designed to reveal whether a paid message supporting a candidate or opposing another was authorized by a candidate. The FCC and the FEC released a joint Public Notice on June 19, 1978, 69 FCC 2d 1129, which gives examples of ways in which both the FCC's requirements and the FEC's requirements may be met in a single announcement. For example, if a program or announcement is both paid for and authorized by a candidate or his committee, an announcement that it was paid for or sponsored by the candidate or committee will be sufficient, since authorization by the candidate is assumed and need not be stated. However, when a third party pays for a program or announcement authorized by a candidate or his committee, an announcement like this is required:

> Paid for (or sponsored) by (name of sponsor/payor) and authorized by (name of candidate or committee).

If the program or announcement is paid for by a third party but *not* authorized by any candidate or any candidate's committee, an announcement with both FCC and FEC requirements:

> Paid for (or sponsored) by (name of sponsor payor) and not authorized by any candidate.

The above announcements are merely examples of ways in which both statutes can be complied with in a single announcement. Broadcast licensees are responsible for making sure that an announcement is given revealing who paid for or sponsored an announcement or program, and candidates or their committee (or an outside party paying for the broadcast) are responsible for disclosing whether the program or announcement was authorized by a candidate or his committee.

Miscellaneous Rules and Policies

Logging Political Programs

99. The rules require that stations record many kinds of information in their program logs about the programs they broadcast.[238] This Primer will discuss only the parts of the logging rules that deal specifically with political broadcasts. They are:

(a) The requirement in subsection (b)(1)(v) that a log entry be made for "each program presenting a political candidate, showing the name and political affiliation

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[238] Section 73.1810 of the Commission's Rules.

[party] of such candidate."[239] This requirement applies both to programs and spot announcements. It is in addition to the general requirement that for all sponsored programs and announcements, political or otherwise, the broadcaster must record in the log the name of the sponsor of the program or announcement.

(b) The general logging rules require that an entry be made "classifying each program as to type." Political programs, one of the types, are defined in the NOTES at the end of the program logging rules as follows: Political programs (POL) include those which present candidates for public office or which give expressions (other than in station editorials) to views on such candidate or on issues subject to public ballot. (Political spot announcements need not be classified in the logs "as to type.")

With certain exceptions that are explained in the rules, program logs must be made available for public inspection, but not until 45 days after the date of the programs that they cover.[240]

Computing Commercial Time

100. Computing total commercial time in political broadcasts depends on whether they are spot announcements or programs. If they are spot announcements they are treated in the program logs like any other commercial announcement, and the time used for paid political and commercial advertising spots is added together to arrive at the total time devoted to commercials in any clock hour. However, when a candidate or his supporters buy time for a program—perhaps a speech by the candidate or a panel discussion of the issues in the campaign—the station does not need to compute *any* commercial time for the program. The Commission decided years ago that since it is usually impossible to separate the so-called "commercial" and "non-commercial" parts of paid political and religious programs and since the Commission didn't want to discourage stations from carrying either kind of program by requiring them to be counted as entirely commercial, it would make an exception for them in computing commercial content of sponsored programs. (The exception does not include time actually devoted to selling a commercial product or service, such as a book or album of religious music.)[241]

"Political File"

101. Section 73.1940(d) of the rules requires broadcasting stations to:

> . . .Keep and permit public inspection of a complete record (political file) of all requests for broadcast time made by or on behalf of candidates for public office, together with an appropriate notation showing the disposition made by the licensee of such requests, and the charges made, if any, if the request is granted. When free time is provided for use by or on behalf of such candidates, a record of the free time provided shall be placed in the political file. All records required by this paragraph shall be placed in the political file as soon as possible and shall be retained for a period of two years.

(Section 76.205(d) of the cablecasting rules contained the same requirements.) The language of the political file rule was recently revised by the Commission to make clear the fact that a broadcaster or cable operator must record in the file not only "requests" for time but gifts of time, whether or not the time is given as the result of a request. The language also was revised to state that all records of requests for time or gifts or sales of it must be entered in the political file as soon as possible throughout a political campaign.

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[239] If the candidate is an independent, the log entry should indicate that fact.

[240] See Section 73.1850, "Availability of logs and records."

[241] See *Amendment of §§73.112, etc.* 11 FCC 2d 992, 993 (1968).

Otherwise, candidates might be denied their rights to equal opportunities because they might not learn within the seven-day period that their opponents had bought or been given time on stations or cable systems. In clarifying the rule, the Commission also explained that the rule applies not only to time used by candidates themselves but also to time in which others speak on their behalf.

No Indemnity Agreements Can be Required

102. A station may not require a candidate to sign an agreement to indemnify it against possible liability resulting from the candidate's proposed broadcast. The U.S. Supreme Court held in the *WDAY* case[242] that a station is not liable for libelous statements broadcast by a candidate. Therefore, an indemnification agreement is not needed to protect a station and requiring a candidate to sign such an agreement in advance "is likely to inhibit a candidate's use of a broadcast facility and possibly affect his decision on whether to utilize a station to address the public."[243]

Political Ads on UHF Translators

103. UHF translator stations are allowed to originate visual slide announcements not exceeding 30 seconds per hour which contain commercial advertising. Although "the nature of translators and the limitations on local originations makes it extremely difficult for translator licensees to comply with Section 315. . and the rules relating to political advertising. . .if UHF translator licensees originate political advertisements "they will be expected to comply strictly with the provisions of Section 315. . ."[244]

Disputes over Terms or Performance of Contract

104. Disputes sometimes develop between broadcasting stations and sponsors over whether the station broadcast as many spots as it contracted to broadcast, whether the spots were broadcast in the time periods promised to the advertiser, whether the announcer read the continuity correctly, etc. The FCC has always taken the position that it cannot settle disputes over contracts between the more than 9,500 broadcasting stations in the United States and their advertisers. Such disputes can best be settled by negotiations between the two parties or in civil actions in the local courts. This principle applies to disputes between stations and candidates as well as other advertisers. If there is evidence of fraud on the part of the station licensee or of an effort to discriminate against a candidate, the Commission will investigate, but it will not become involved in the usual contract dispute.[245] (For a discussion of a station's furnishing "make-good" time when a program or announcement is omitted or its broadcast is seriously marred by technical problems, see paragraph 56.

Adopted: July 20, 1978

Federal Communications Commission,
William J. Tricarico, *Secretary*

Appendix.—The Commission's Rules and Regulations in 47 CFR Chapter I on Political Broadcasting and Cablecasting

105. Following are the rules for broadcasts by candidates for public office:

§73.1940 *Broadcasts by candidates for public office.*

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[242] *Farmers Educational and Cooperative Union of America* v. *WDAY, Inc.*, 360 U.S. 525 (1959).

[243] *Senator Hubert H. Humphrey*, 37 FCC 2d 576, 577 (1972).

[244] *Public Notice, Acceptance of Political Advertising by UHF Translator Licensees*, 62 FCC 2d 896 (1976).

[245] *KAIT-TV*, 62 FCC 2d 138 (1976); *Letter to Mrs. Nancy Brown*, February 25, 1977.

(a) *Definitions.* (1) A legally qualified candidate for public office is any person who—
(i) has publicly announced his or her intention to run for nomination or office;
(ii) is qualified under the applicable local state or federal law to hold the office for which he or she is a candidate; and,
(iii) has met the qualifications set forth in either subparagraphs (2), (3), or (4), below.
(2) A person seeking election to any public office including that of President or Vice President of the United States, or nomination for any public office except that of President of Vice President, by means of a primary, general or special election, shall be considered a legally qualified candidate if, in addition to meeting the criteria set forth in subparagraph (1) above, that person—
(i) has qualified for a place on the ballot, or
(ii) has publicly committed himself or herself to seeking election by the write-in method and is eligible under applicable law to be voted for by sticker, by writing in his or her name on the ballot or by other method, and makes a substantial showing that he or she is a bona fide candidate for nomination or office.

Persons seeking election to the Office of President or Vice President of the United States shall, for the purposes of the Communications Act and the rules thereunder, be considered legally qualified candidates only in those states or territories (or the District of Columbia) in which they have met the requirements set forth in paragraph (a)(1) and (2) of this rule: *Except*, That any such person who has met the requirements set forth in paragraph (a)(1) and (2) in at least 10 states (or nine and the District of Columbia) shall be considered a legally qualified candidate for election in all states, territories and the District of Columbia for purposes of this Act.

(3) A person seeking nomination to any public office except that of President or Vice President of the United States, by means of a convention, caucus or similar procedure, shall be considered a legally qualified candidate if, in addition to meeting the requirements set forth in paragraph (a)(1) above, that person makes a substantial showing that he or she is a bona fide candidate for such nomination: *Except*, That no person shall be considered a legally qualified candidate for nomination by the means set forth in this paragraph prior to 90 days before the beginning of the convention, caucus or similar procedure in which he or she seeks nomination.
(4) A person seeking nomination for the office of President or Vice President of the United States shall, for the purposes of the Communications Act and the rules thereunder, be considered a legally qualified candidate only in those states or territories (or the District of Columbia) in which, in addition to meeting the requirements set forth in paragraph (a)(1) above—
(i) he or she, or proposed delegates on his or her behalf, have qualified for the primary or Presidential preference ballot in that state, territory or the District of Columbia, or
(ii) he or she has made a substantial showing of bona fide candidacy for such nomination in that state, territory or the District of Columbia; *Except*, That any such person meeting the requirements set forth in paragraph (a)(1) and (4) in at least ten states (or nine and the District of Columbia) shall be considered a legally qualified candidate for nomination in all states, territories and the District of Columbia for purposes of this Act.
(5) The term "substantial showing" of bona fide candidacy as used in paragraphs (a)(2), (3) and (4) above means evidence that the person claiming to be a candidate has engaged to a substantial degree in activities commonly associated with political campaigning. Such activities normally would include making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign headquarters (even though the headquarters in some instances might be the residence of the candidate or his campaign manager). Not all of the listed activities are necessarily required in each case to demonstrate a substantial showing, and there may be activities not listed herein which would contribute to such a showing.

(b) *Charges for use of stations.* The charges, if any, made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed (1) during the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period, and

(2) at any other time, the charges made for comparable use of such station by other users thereof. The rates, if any, charged all such candidates for the same office shall be uniform and shall not be rebated by any means direct or indirect. A candidate shall be charged no more than the rate the station would charge if the candidate were a commercial advertiser whose advertising was directed to promoting its business within the same area as that encompassed by the particular office for which such person is a candidate. All discount privileges otherwise offered by a station to commercial advertisers shall be available upon equal terms to all candidates for public office.

(3) This paragraph shall not apply to any station which is not licensed for commercial operation.

(c) *Discrimination between candidates.* In making time available to candidates for public office, no licensee shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any licensee make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to broadcast to the exclusion of other legally qualified candidates for the same public office.

(d) *Records, inspection.* Every licensee shall keep and permit public inspection of a complete record (political file) of all requests for broadcast time made by or on behalf of candidates for public office, together with an appropriate notation showing the disposition made by the licensee of such requests, and the charges made, if any, if the request is granted. When free time is provided for use by or on behalf of such candidates, a record of the free time provided shall be placed in the political file. All records required by this paragraph shall be placed in the political file as soon as possible and shall be retained for a period of two years. See Sections 1.526 and 1.527 of this chapter.

(e) *Time of request.* A request for equal opportunities must be submitted to the licensees within one week of the day on which the first prior use, giving rise to the right of equal opportunities, occurred: *Provided,* however, That where the person was not a candidate at the time of such first prior use, he shall submit his request within one week of the first subsequent use after he has become a legally qualified candidate for the office in question.

(f) *Burden of proof.* A candidate requesting equal opportunities of the licensee, or complaining of noncompliance to the Commission shall have the burden of proving that he or his opponent are legally qualified candidates for the same public office.

Political Cablecasting Rules

106. Following are the rules for origination cablecasts by candidates for public office:

§76.5 *Definitions.*

Sections (a) thru (x) are omitted. (y) *Legally qualified candidate.* (1) Any person who—

(i) has publicly announced his or her intention to run for nomination or office;

(ii) is qualified under the applicable local, state or federal law to hold the office for which he or she is a candidate; and,

(iii) has met the qualifications set forth in either subparagraphs (2), (3), or (4), below.

(2) A person seeking election to any public office including that of President or Vice President of the United States, or nomination for any public office except that of President or Vice

President, by means of a primary, general or special election, shall be considered a legally qualified candidate if, in addition to meeting the criteria set forth in subparagraph (1) above, that person:

(i) has qualified for a place on the ballot, or

(ii) has publicly committed himself or herself to seeking election by the write-in method and is eligible under applicable law to be voted for by sticker, by writing in his or her name on the ballot or by other method, and makes substantial showing that he or she is a bona fide candidate for nomination or office.

Persons seeking election to the office of President or Vice President of the United States shall, for the purposes of the Communications Act and the rules thereunder, be considered legally qualified candidates only in those states or territories (or the District of Columbia) in which they have met the requirements set forth in paragraphs (y)(1) and (2) of this rule; *Except*, That any such person who has met the requirements set forth in paragraph (y)(1) and (2) in at least 10 states (or nine and the District of Columbia) shall be considered a legally qualified candidate for election in all states, territories and the District of Columbia for purposes of this Act.

(3) A person seeking nomination to any public office except that of President or Vice President of the United States, by means of a convention, caucus or similar procedure, shall be considered a legally qualified candidate if, in addition to meeting the requirements set forth in paragraph (y)(1) above, that person makes a substantial showing that he or she is a bona fide candidate for such nomination; *Except*, That no person shall be considered a legally qualified candidate for nomination by the means set forth in this paragraph prior to 90 days before the beginning of the convention, caucus or similar procedure in which he or she seeks nomination.

(4) A person seeking nomination for the office of President or Vice President of the United States shall, for the purposes of the Communications Act and the rules thereunder, be considered a legally qualified candidate only in those states or territories (or the District of Columbia) in which, in addition to meeting the requirements set forth in paragraph (y)(1), above (i) he or she, or proposed delegates on his or her behalf, have qualified for the primary or Presidential preference ballot in that state, territory or the District of Columbia, or (ii) he or she has made a substantial showing of bona fide candidacy for such nomination in that state, territory or the District of Columbia; *Except*, That such person meeting the requirements set forth in paragraph (y)(1) and (4) in at least 10 states (or nine and the District of Columbia) shall be considered a legally qualified candidate for nomination in all states, territories and the District of Columbia for purposes of this Act.

(5) The term "substantial showing" of bona fide candidacy as used in paragraphs (y)(2), (3), and (4) above means evidence that the person claiming to be a candidate has engaged to a substantial degree in activities commonly associated with political campaigning. Such activities normally would include campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, and establishing campaign headquarters (even though the headquarters in some instances might be the residence of the candidate or his campaign manager). Not all of the listed activities are necessarily required in each case to demonstrate a substantial showing, and there may be activities not listed herein which would contribute to such a showing.

§76.205 Origination cablecasts by candidates for public office.

(a) *General requirements.* If a cable television system operator shall permit any legally qualified candidate for public office to use the system's origination channel(s) and facilities therefor, the system operator shall afford equal opportunities to all other such candidates for that office: *Provided, however,* That such cable television system operator shall have no power of censorship over the material cablecast by any such candidate; *And provided, further,* That an appearance by a legally qualified candidate on any;

(1) Bona fide newscast,

(2) Bona fide interview,

(3) Bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) On-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of the facilities of the system within the meaning of this paragraph.

NOTE: The Fairness Doctrine is applicable to these exempt categories. See §76.209.

(b) *Charges for use of cable systems.* The charges, if any, made for the use of any cable television system by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed;

(1) during the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the cable television system for the same class and amount of time for the same period, and

(2) at any other time the charges made for comparable use of such system by other users thereof. The rates, if any, charged all such candidates for the same office shall be uniform and shall not be rebated by any means direct or indirect. A candidate shall be charged no more than the rate the cable television system would charge if the candidate were a commercial advertiser whose advertising was directed to promoting its business within the same area as that encompassed by the particular office for which such person is a candidate. All discount privileges otherwise offered by a cable television system to commercial advertisers shall be available upon equal terms to candidates for public office.

(c) *Discrimination between candidates.* In making time available to candidates for public office, no cable television system operator shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any cable television system operator make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to cablecast to the exclusion of other legally qualified candidates for the same public office.

Control, Concentration
Ownership of Stations, Limitations on

Commission affirmed its conclusion in *Report and Order* in MM Docket No. 84-19 that the public interest is best served by elimination of the "regional concentration of control" provisions of multiple ownership rules. Petitions for reconsideration, suggesting several alternatives to repeal of the rule, denied.
Regional Concentration of Control
MM Docket No. 84-19

FCC 85-225

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Repeal of the "Regional Concentration of Control" Provisions of the Commission's Multiple Ownership Rules.	MM Docket No. 84-19 RM-4564

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1985; Released: May 8, 1985

BY THE COMMISSION: COMMISSIONER RIVERA DISSENTING AND ISSUING A STATEMENT.

Background

1. The Commission has before it two petitions for reconsideration of the *Report and Order* ("*Order*") in this proceeding,[1] filed by Henry Geller and Donna Lampert ("Geller") and by Citizens Communications Center on behalf of Black Citizens for a Fair Media ("BCFM"), as well as a motion for stay filed on behalf of BCFM.[2] The petitions essentially

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[1] FCC 84-156, 49 Fed. Reg. 19670 (May 9, 1984), 55 R.R. 2d 1389 (1984), *appeal pending sub nom. National Association for Better Broadcasting, et al. v. FCC*, No. 84-1274 (D.C. Cir. filed June 29, 1984).

[2] In its motion, BCFM requests that the Commission stay the effectiveness of the *Order* repealing the regional concentration rules until 30 days after the Commission has ruled on BCFM's petition for reconsideration in this proceeding. Because BCFM has not met the stringent test for a stay, the motion is denied. Specifically, BCFM did not show that it was likely to prevail on the merits of its petition because it has not raised a serious legal question concerning the sufficiency of the record in this proceeding. Furthermore, we

question the sufficiency of the record in this proceeding, including whether adequate consideration was given to proposed alternatives to repeal of the regional concentration rule. Oppositions to both petitions and the motion for stay were filed by the National Association of Broadcasters ("NAB"), and an opposition to BCFM's petition was filed on behalf of Forward Communications Corporation, *et al.* ("Forward"). No replies were filed by the petitioners.

2. In the *Order*, we determined that the public interest would best be served by elimination of the "regional concentration of control" provisions of the multiple ownership rules. Specifically, Sections 73.35(b)(1), 73.240(a)(2), and 73.636(a)(2) of the Commission's Rules[3] prohibited the common ownership, operation, or control of three commercial AM, FM, or television stations where any two were located within 100 miles of the third, and where there was primary service contour overlap between any of the stations.[4] Although this rule was designed to promote the dual goals of greater diversity of viewpoints and economic competition, the *Order* found that substantial growth in the media marketplace had considerably attenuated the need for the rule to achieve these goals. The *Order* also considered the substantial administrative and opportunity costs imposed by the rule, concluding that such costs are no longer warranted.

BCFM's Petition

3. In its petition, BCFM contends that the Commission has not set forth the relevant evidence required to support the *Order's* conclusion that marketplace developments have rendered the regional concentration rule unnecessary. BCFM claims that the *Order's* reliance upon the national growth in the number and variety of media outlets that has occurred since the rule's adoption is not a sufficient basis to conclude that

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find that no irreparable harm would flow to BCFM or the public from denial of a stay. Although BCFM contends that, without the regional rules, diversity of viewpoints may decline in some markets and the market power of some owners may increase, such a result is unlikely given the substantial growth in the number of media outlets and the existence of our other multiple ownership rules. *See Virginia Petroleum Jobbers, Inc. v. FPC*, 259 F.2d (D.C. Cir. 1958); and *Washington Metropolitan Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

[3] These sections were recently deleted and consolidated into new Section 73.3555, without changing any substantive provisions, as part of our action in the *Report and Order* in MM Docket No. 83-46 *et al.*, 49 Fed. Reg. 19482 (May 8, 1984). However, to provide continuity with our discussion in the *Notice of Proposed Rule Making*, 96 FCC 2d 578(1984), and the *Order* in this proceeding, we shall continue to refer herein to the rules by their former section designations.

[4] The term "primary service contour" refers to the predicted or measured 0.5 mV/m contour for AM stations, the predicted 1.0 mV/m contour for FM stations, and the predicted Grade B contour for TV stations.

the rule is no longer needed to promote diversity of viewpoints and economic competition. With respect to the diversity issue, BCFM argues that the Commission must determine whether the number of media voices, not outlets, has increased over time because, in some cases, an individual broadcast entity may control a number of outlets. Furthermore, BCFM asserts that, with the exception of its five market survey, no evidence has been presented on the ownership and control of media outlets on a regional basis. This study purported to show that, despite increases in the number of broadcast stations between 1972 and 1982, concentration of ownership had increased or remained the same in five selected Areas of Dominant Influence (ADI's).

4. BCFM further contends that the Commission's analysis of its five market survey was faulty. Petitioner argues that the Commission wrongly considered the number of independent "voices" in these ADI's, and that such an approach "has no rational relationship ... to market power." BCFM asserts that "[t]he Commission must use some definition of diversity which incorporates market power."[5] BCFM also believes that the Commission should not have included noncommercial broadcast stations in analyzing BCFM's study because such stations do not depend upon advertising, which is an important element in determining economic market power. Similarly, petitioner contends that nonbroadcast media should not be considered in connection with concentration issues. With the exception of cable television, BCFM asserts, such media are not sufficiently developed to be a viable source of competition.

5. BCFM next alleges that the *Order* did not adequately consider the alternatives to outright repeal of the regional concentration rule that it proposed in its reply comments. Specifically, BCFM suggests that the Commission reinstitute the "fixed" regional concentration rule, with its minimum distance and contour overlap criteria, but establish a liberal waiver procedure. Under this reformulated rule, waiver requests would be granted if the applicant could show that the result would be: (1) the upgrading of existing broadcast facilities; (2) the development of better programming or regional networks; or (3) the activation of unused allocations. This approach, BCFM contends, should allay the Commission's concern that retention of a modified regional concentration rule would hinder the improvement of broadcast facilities and the expansion of service to the public, yet it would permit continued regulatory review of concentration issues.

6. BCFM further asserts that the Commission did not consider the impact that repeal of the regional rule would have on the national multiple

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[5] BCFM believes that concentration of ownership should be measured by (1) the percentage of stations in a region owned by persons holding more than one license in that region; or (2) the average number of stations per owner in that region.

ownership rule, which, at the time of BCFM's filing, limited common ownership to 7 AM, 7 FM, and 7 TV stations (only 5 of which could be VHF stations).[6] BCFM believes that limitations on ownership are necessary on both national and regional levels, and that the Commission should have expressly considered BCFM's alternative of retaining the national multiple ownership rule in the event that it repealed the regional rule. As a final matter, BCFM contends that the Commission erred in disregarding its request to provide guidance as to the type of evidence that BCFM could have gathered within the 30-day comment period which would show that the regional rule produced some public interest benefits.

7. In opposition, Forward contends that BCFM has not presented either legal or factual bases for changing the *Order's* conclusion. Forward believes that the rule has been ineffective because it did not take into account factors relevant to whether an undue concentration of control would be likely in any given situation. It also claims that no evidence has been presented challenging the Department of Justice's opinion that repeal of the regional rule is not likely to present antitrust concerns. Similarly, NAB contends that no basis exists for reconsideration. In this regard, NAB alleges that BCFM is in essence restating arguments made earlier in this proceeding and rejected in the *Order*. NAB further asserts that, in repealing this rule, the Commission is not required to justify every aspect of its cost/benefit analysis by citing findings in the record but may make informed predictions of the likely result of repeal of the rule. Consequently, NAB concludes that BCFM has misconstrued the broad discretion that an agency has in changing its rules.

Geller's Petition

8. Geller's petition seeks reconsideration of our *Order* on two grounds. First, Geller contends that the *Order* failed to consider the significant alternative of a regional concentration index ("RCI"). The petitioner notes that such a proposal was originally suggested in the comments of S. Besen and L. Johnson ("Rand Corporation"), but he modifies this proposal in several respects. Under Geller's version, the relevant geographic region would be each individual state in order to further the diversity of viewpoints in the statewide political arena. The

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[6] The Commission subsequently revised the national media multiple ownership rules to permit an individual or a single entity to hold a cognizable interest in up to twelve stations in each service. Additionally, the Commission imposed a maximum national audience reach limitation on television station ownership and provided certain "minority incentives." *See Report and Order* in Gen. Docket No. 83-1009, FCC 84-350 (released August 3, 1984), *recons. granted in part*, FCC 84-638 (released February 1, 1985), *appeal docketed sub nom. National Association of Black Owned Broadcasters v. FCC*, No. 85-1139 (D.C. Cir. filed March 4, 1985).

Commission would seek to determine the levels of concentration of viewership or listenership within each state. Specifically, concentration would be measured by the relative share of the news audience that each station has in any given state, and these figures would be squared, in a manner similar to the Herfindahl-Hirschman Index, in order to account for stations with relatively significant shares. The Commission would then determine an acceptable concentration level standard to be applied whenever a station acquisition is proposed. If an acquisition would result in a number above the permissible level, it would be prohibited, unless there were a demonstration of compelling circumstances.

9. Second, Geller asserts that the Commission erred as a matter of law by repealing the regional rule. In this regard, petitioner contends that ownership provisions have been the direct result of the Communications Act. Petitioner states that Congress recently reaffirmed its concern with promoting diversity of viewpoints by amending section 309(i)(3)(A) of the Communications Act to require diversity preferences in lotteries. Furthermore, citing *Associated Press v. United States,* 326 U.S. 1, 20 (1945), Geller alleges that there is a constitutional basis for the concern over undue media concentration and preservation of a diversity of sources. Geller believes that repeal of the regional rule constitutes an abdication of these legal responsibilities. Moreover, Geller contends that the *Order* does not set forth a specific factual basis for departing from the Commission's long-standing concern with diversity.

10. In its opposition, NAB contends that the Commission is not required in an informal rule-making proceeding to expressly consider every possible suggestion. Further, notes NAB, Geller's proposed RCI would result in a return to the case-by-case approach because the Commission would have to calculate separate index levels for each state, one or more of which could be involved in any proposed acquisition. Since the Commission expressed its intent to avoid the administrative burdens and arbitrary results that would recur if a case-by-case approach were reinstituted, NAB contends that Geller's proposal was essentially addressed by the *Order.* Finally, NAB contends that the Commission did not abdicate its statutory responsibility in repealing the regional rule because the Communications Act does not expressly require any ownership provisions and because the Commission may alter its rules in light of changing circumstances within the communications industry.

Discussion

11. After careful consideration of the subject petitions and related pleadings, we conclude that no modification of our *Order* in this proceeding is warranted. Neither BCFM nor Geller has set forth any new evidence that causes us to change our conclusion that the public interest is best served by elimination of the regional concentration rule.

12. *BCFM's Petition.* We are not persuaded by BCFM that the record in this proceeding is insufficient to support repeal of the regional concentration rule. On the contrary, we believe that the evidence upon which the *Order* relies fully supports the rule's elimination. First, to the extent that BCFM alleges that the record is insufficient because we did not consider specific regional data, it is mistaken. Both the *Notice of Proposed Rule Making* and the *Order* in this proceeding discussed in detail cases arising under the "fixed" rule, and these cases, together with our experience administering the rule, provide ample evidence that the rule should not be retained. In particular, we found that applications to purchase, build, or modify broadcast stations had been dismissed or denied without regard to the competitive realities of the marketplace, the size of the stations involved, or relevant geographic factors. Under these circumstances, we determined that the rule was not serving its ultimate objectives of promoting greater diversity of viewpoints and economic competition.

13. Second, although BCFM believes that more specific data are needed to properly evaluate the continuing need for the regional concentration rule, we do not agree. We continue to believe that the dramatic growth of media outlets on a national basis and in all areas of the country provides sound evidence that the number of media outlets is growing on a regional basis. Rather than offering any new data, BCFM continues to rely upon its limited study of ownership trends in five selected areas, which is based upon the assumption that an "ADI" is the appropriate "region" for analysis. However, as the *Order* pointed out, the use of "ADI's" as a standard for determining regional concentration was specifically rejected in Docket No. 20548 as "extremely inequitable and totally unworkable."[7] This is because ADI's vary greatly in area and population. Furthermore, BCFM's study ignores the fact that the "fixed" rule's definition of a region — two stations within 100 miles of a third, and primary service contour overlap between any two stations — has never comported with geographic or political boundaries or marketplace realities.

14. Even assuming that it was appropriate for BCFM to use "ADI's" in its study, we continue to believe that the study simply does not show what BCFM believes that it does. Although BCFM contends that concentration levels have increased or remained the same in the five selected ADI's, we disagreed, finding that diversity of viewpoints — defined as the number of independent voices — had increased or remained the same in four of these ADI's and that in the fifth ADI, the number of independent voices declined by only one voice in ten years. BCFM challenges this finding on the grounds that our definition of diversity does

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[7] *First Report and Order* in Docket No. 20548, 63 FCC 2d 824, 828 (1977).

not account for market power by group owners, that we should not have included noncommercial stations, and that the use of BCFM's suggested indices of concentration would show increases in levels of concentration. We disagree. First, it is reasonable to count the number of independent voices because the regional concentration rule was aimed at promoting both diversity of viewpoint and economic competition, and between these two goals, diversity of viewpoint has traditionally been considered more important.[8] Second, we included noncommercial stations for purposes of measuring diversity, not concentration; and it is reasonable to do so because noncommercial stations represent additional independent voices. In this regard, we note that the United States Court of Appeals recently held that it was not improper for the Commission to take into account programming from noncommercial and cable television stations in making policy determinations regarding the obligations of commercial television broadcasters in meeting the program needs of children in their communities. *Action for Children's Television v. FCC,* No. 84-1052, slip op. at 4 (D.C. Cir. March 19, 1985) (per curiam). Third, BCFM's suggested indices of economic concentration would be valid measures only if they were applied to valid economic markets. Yet, the record in this proceeding clearly demonstrates - based upon the comments of the Department of Justice, an agency entrusted by Congress with enforcement of the antitrust laws - that, in this context, a "region" is not the relevant economic market. This is the case because competition for programming and advertising occurs principally at the local and national levels. Finally, BCFM's proposed indices are not reliable indicators of the relative market strength of group owners because they treat all stations equally and do not account for station size and audience reach.[9] In sum, petitioner has not shown, either on economic concentration or voice diversity grounds, that repeal of the regional rule was inappropriate.

15. Beyond these deficiencies, BCFM's petition ignores several other factors that we considered in reaching our decision to repeal the regional rule. Specifically, BCFM's petition does not discuss our finding that, in

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[8] *See Notice of Proposed Rule Making* in Gen. Docket No. 83-1009, 48 Fed. Reg. 49438 (October 25, 1983). The goals of both the national and regional multiple ownership rules have been to promote diversity of viewpoint and economic competition. "Of these objectives, the Commission has in its various ownership policies 'placed principal reliance on ensuring diversity in sources of information because of the part such diversity serves in reaching First Amendments goals.' " *Id.* at 49446 (para. 40).

[9] To the extent that BCFM believes that the new nonbroadcast media are not sufficiently developed to be considered, we note that, in analyzing the 5 ADI's selected by BCFM, we only counted existing outlets and did not include future potential services. Furthermore, we continue to believe that nonbroadcast outlets are relevant because of the additional economic competition and diversity of viewpoint that they provide. Contrary to BCFM's assertion, this issue was raised in para. 22 of the *Notice* and was supported by the record in this proceeding.

addition to the overall growth in the marketplace, the need for the regional rule has also been lessened by the proven effectiveness of the "duopoly" and "one-to-a-market" rules. As we stated in the *Order*, these rules

> will continue to restrain group ownership, often more stringently, in many situations that would have been subject to the regional limitations. Moreover, this "overlap" of the local and regional rules most often occurs in "core market" areas, where our concern for diversity and economic competition is most intense.[10]

16. BCFM also fails to present any new evidence to controvert our finding that the regional concentration rule imposed substantial opportunity costs on the industry and the public by precluding improvements to existing facilities and the expanded service such improvements could provide. Similarly, BCFM submits no new data or arguments to undermine our conclusion that the rule hindered broadcasters' ability to take advantage of operating efficiences and economies of scale resulting from regional ownership which might permit them to channel saved resources into such areas as improved programming.

17. We note that BCFM questions the severity of the rule's administrative impact on the Commission, noting that there were only three reported regional cases in 1982 and 1983. However, the number of reported cases represents only part of the burden placed on the Commission. As acknowledged by BCFM, about 71 construction permit or assignment applications per year raise regional concentration questions, requiring the staff to request and analyze amendments. Many of these amendments cure potential regional issues, which explains why the number of reported cases may be low in a given year. Nevertheless, we believe that this expenditure of staff time does constitute an appreciable burden on the Commission, especially when the other factors considered indicate that the need for the rule has been effectively eliminated and that the rule imposes significant costs on both the public and the broadcast industry.

18. Further, contrary to BCFM's contention, we clearly considered the alternatives to outright repeal of the rule offered by petitioner and found them unpersuasive. With respect to BCFM's suggestion that we retain the "fixed" rule and establish a liberal waiver procedure, the *Order* concluded that this would in effect return us to the case-by-case approach which had proven both burdensome and ineffective. There is nothing in BCFM's petition that would cause us to alter this assessment. Indeed, BCFM's suggestion that waiver requests could be granted if certain conditions are

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[10] *Report and Order* in MM Docket No. 84-19, *supra* n.1 at para. 20. The *Order* also noted that diversity is further ensured by operation of the "diversification criteria," under which in comparative hearings between two or more applicants for a broadcast station a preference is given to the applicant with the least amount of other media interests.

met would not only return us to a subjective case-by-case approach, it would also involve the Commission in content-based programming evaluations. For example, BCFM believes that a waiver request should be granted if it would result in "better" programming. Such an approach clearly presents serious First Amendment problems that, even absent other disadvantages, render it unacceptable. BCFM's approach would also require us to make case-by-case determinations concerning how much of an improvement in a station's facilities or audience reach would be required before a waiver request would be granted. Such determinations would be difficult, time consuming and unwarranted given the absence of any continuing need for the rule.[11]

19. *Geller's Petition.* We have reviewed Geller's proposal for a regional concentration index ("RCI") and conclude that, on balance, it is not a viable alternative to repeal of the regional rule. First, it has been well established in this proceeding that a "region" is an inappropriate market for measuring concentration of viewership or listenership because competition for both program acquisition and advertising occurs mainly on local and national levels. Geller has not set forth any data to refute this fact. Moreover, Geller defines each individual state as a region despite the fact that the Commission has previously determined that a state is an inappropriate standard for considering regional ownership matters.[12] Geller has not presented any new information that would cause us to change our view in this regard.

20. Geller also does not explain how the Commission would determine the cut-off level for acceptable concentration utilizing the RCI, nor is it clear whether there would be a single national standard or separate indices for each state. Furthermore, Geller's examples involve only television, and he has not shown how a single RCI for each state could be

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[11] BCFM's other suggestion involves the propriety of retaining the "seven station" rule. That issue was the subject of a separate rule making proceeding to which BCFM was a party. Having fully considered BCFM's allegations in that proceeding, we need not discuss them here. *See* n.6, *supra.* We also reject BCFM's assertion that we erred in failing to provide guidance as to the type of evidence it could have gathered regarding the benefits of the regional rule. Section 5 of the Administrative Procedure Act, 5 U.S.C. §553 (1976), requires the Commission to provide notice of the subjects and issues involved in the rule making, and in doing so here, we fully discussed the evidence and data we believed relevant to our proposal. Interested parties are free to offer contrasting or additional data to support their particular positions, but we are not required to formulate their arguments for them. Accordingly, the Commission is not required to inform interested parties what to offer in support of a particular position.

[12] *See Notice of Proposed Rule Making* in MM Docket No. 84-19, 49 Fed. Reg. 2478, 2479 (January 20, 1984). *See also First Report and Order* in BC Docket No. 20548, 63 FCC 2d 824, 827-28 (1977).

computed by combining both radio and television news audience data.[13] Finally, we note that a station's share of the news audience is itself a variable, and Geller has not shown how his RCI, which is based upon this data, would account for variations in a station's news audience.

21. As to Geller's contention that we have erred legally in repealing the regional rule, Geller has cited no statutory or judicial authority that requires the Commission to retain the regional ownership rule. On the contrary, it is well established that "[r]egulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy."[14] Given our finding that the rule more likely impedes than advances diversity and competition in modern telecommunications markets, repeal of the regional ownership provisions reflects compliance with, not violation of, this principle of administrative law.[15] Moreover, this is not the only time that a rule or policy that sought to promote diversity and competition was found to be no longer useful. Recently, we eliminated, with judicial approval, the "top fifty market policy" on similar grounds.[16]

22. *Conclusion.* After carefully reviewing the petitions for reconsideration, as well as the oppositions filed, we continue to believe that the public interest is best served by repeal of the regional rule. This result is properly supported by the record in this proceeding and is consistent with the standards required of an agency when it repeals a longstanding policy or rule.[17]

23. Accordingly, IT IS ORDERED, THAT the Petitions for Reconsideration filed by Black Citizens for a Fair Media and by Henry Geller and Donna Lampert ARE DENIED.

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[13] It also appears that Geller's RCI would be very burdensome to administer. Geller admits, for example, the Commission would have to utilize "raw data" from Arbitron for each station to be included in the RCI calculation, yet such raw data are not available for some radio markets. In addition to compiling this information and determining the RCI for each state, further staff time would be required to periodically update this information and to apply the indices to each proposed acquisition of a broadcast station.

[14] *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1425 n.25, *quoting American Trucking Association, Inc. v. Atchison, Topeka and Santa Fe Railway Company*, 387 U.S. 397, 416 (1967).

[15] To the extent Geller's argument assumes that our action repealing the rule will adversely affect diversity of viewpoint, the record in this proceeding indicates the opposite and Geller has not set forth any new data to refute this point.

[16] *See National Association for the Advancement of Colored People v. FCC*, 682 F.2d 993 (D.C. Cir. 1982).

[17] *See Office of Communications of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983); and *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1980).

24. IT IS FURTHER ORDERED, THAT the Motion for Stay of our *Order* in this proceeding filed by Black Citizens for a Fair Media IS DENIED.

25. IT IS FURTHER ORDERED, THAT the Secretary shall cause a copy of this *Memorandum Opinion and Order* to be published in the FCC Reports.

26. Authority for this action is contained in Sections 4(i), 303(g), 303(r), and 405 of the Communications Act of 1934, as amended.

27. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

DISSENTING STATEMENT
OF
COMMISSIONER HENRY M. RIVERA

RE: Memorandum Opinion and Order In Re Repeal of Regional Concentration Rule

When the Commission adopted the *Report and Order* in this proceeding I was not persuaded that elimination of the regional concentration rule was in the public interest.[1] I remain unpersuaded. The rule was adopted in 1977 as an adjunct to our local broadcast cross ownership rules.[2] It was adopted to promote diversification of viewpoint in both local markets as well as larger geographic regions.[3] The local cross ownership rules, although intended to limit multiple ownership of media outlets in any single geopolitical area, permit entities to hold a significant number of properties in the same market.[4] The regional concentration rule complemented the local rules by placing an absolute limit on the number of outlets that could be jointly held in a single geopolitical area. Now that the regional concentration rule has been repealed, a single entity may own numerous stations that each broadcast to many of the same residents of a geopolitical area—for instance, two AM-FM combinations and a television facility—despite the existence of our one-to-a-market and duopoly rules. Thus, repealing the regional concentration rule cannot help but undermine diversity in local markets, contrary to the majority's stated intent.

I am likewise unconvinced by the majority's claim that the rule's burdens outweigh its benefits. The rule's chief benefit was that it promoted diversity of ideas in geographic regions by diffusing broadcast station ownership. As indicated above, without the rule, it will be possible for one individual or entity to acquire numerous broadcast outlets in one community or region. In densely populated areas having numerous stations, the impact of such ownership patterns may be hard to discern. But in more sparsely populated areas having fewer outlets for expression—in places west of the Mississippi for instance—it will now be possible for a single owner to wield an unhealthy degree influence over issues important to a state or region through a network of multiply-owned outlets, contrary to longstanding First Amendment principles favoring robust debate from diverse sources of expression.

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[1] *See* FCC 84-156, 49 Fed. Reg. 19670 (May 9, 1984).

[2] Specifically, the local rules include duopoly, one-to-a-market, cable-broadcast and newspaper-broadcast cross ownership restraints.

[3] The Commission stated: "It is our view that the limited allocations available within an area should be distributed so as to prevent too many nearby allocations from coming under the control of a single person or entity." *First Report and Order*, 63 FCC 2d 824, 829 (1977).

[4] The duopoly rule prohibits combined ownership of more than one outlet in the same broadcast service where the signals of the outlets overlap. The one-to-a-market rule, which seeks to restrain combined ownership of outlets in different services, is less restrictive. The rule only restrains multiple ownership of facilities whose signal contours encompass each other. AM-FM combinations are considered a single facility under the rule, while UHF-radio combinations are allowed on a case-by-case basis. Thus, one owner can control a large number of stations in an area recognized as one geographic and often, geopolitical, region, despite FCC restraints on local multiple ownership. *See* Sections 73.3555 (a) and (b) of the Commission's Rules.

The litany of burdens recited by the majority in support of repealing this rule is unpersuasive. Neither arbitrary results, administrative burden nor forgone opportunity costs compelled the elimination of this rule. If inflexible application of the rule caused untenable results, the Commission should have liberalized its waiver policy or modified the rule, not abrogated it. Any administrative burden created by the need to grant an occasional waiver is simply a cost of rationally implementing our public interest mandate, not a reason for shirking that mandate. Finally, the claim that the rules precludes programming efficiencies made possible by multiple ownership has no basis in the record.[5]

In sum, repealing the regional concentration rule is contrary to the public interest. The rule directly promoted diversity of expression inside and outside local markets in a way that imposed minimal costs. The Commission repeals the rule at the expense of diversity of expression and with no discernible counterveiling public interest benefits. I dissent.

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[5] The only evidence before us supports the opposite conclusion—namely, that efficiencies resulting from group ownership, if any, would be small. *See* Comments of Rand Corporation, at p.5.

Comparative Hearing
Hearing, Procedure
Hearing, Right to
Initial Decision, Partial
Qualifications, Comparative

Use of two phased comparative proceedings appropriate procedure to permit applicants to establish requisite comparative superiority over other challengers in multiple hearing cases. Deferral of renewal applicant's comparative qualifications until after its basic qualifications are established in related proceeding does not deny challengers of right to full comparative hearings.
RKO General, INC. (WYFR-FM)
MM Docket No. 84-1085

FCC 85-315

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RKO General, Inc. (WYFR-FM) Chicago, Illinois	MM Docket No. 84-1085 File No. BRH-790801A3
and Associated Dockets[1]	MM Docket Nos. 84-1086 to 84-1087; 84-1089; 84-1094; and 84-1096
RKO General, Inc. (WHBQ-TV) Memphis, Tennessee	MM Docket No. 84-1212 File No BRCT-790402LC
and Associated Dockets	MM Docket Nos. 84-1213 to 84-1214; 84-1216; and 84-1218 to 84-1224

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[1] We have captioned this Order to reflect the fact that questions raised herein are applicable to all pending proceedings involving RKO license renewal applications, other than the KHJ-TV, Los Angeles case.

RKO General, Inc. (WGMS) Bethesda, Maryland	MM Docket No. 84-1148 File No. BR-1403
and Associated Dockets	MM Docket Nos. 84-1149 to 84-1151; 84-1153; 95-1155; 84-1159; 84-1162 to 84-1163; 84-1166 to 84-1167; 84-1170 to 84-1173; 84-1178 to 84-1179; and 84-1182
RKO General, Inc. Boston, Massachusetts	MM Docket No. 84-1057 File No. BR-953
and Associated Dockets	MM Docket Nos. 84-1058 to 84-1059; 84-1061; 84-1063 to 84-1066; 84-1070 to 84-1072; 84-1076 to 84-1078; 84-1080 to 84-1081; and 84-1083 to 84-1084
RKO General, Inc. (WAXY(FM)) Ft. Lauderdale, Florida	MM Docket No. 84-1112 File No. BRH-781002WR
and Associated Dockets	MM Docket Nos. 84-1113 to 84-1114; 84-1116; and 84-1118 to 84-1120
RKO General, Inc. (KHJ) Los Angeles, California	MM Docket No. 84-1184 File No. BR-22
and Associated Dockets	MM Docket Nos. 84-1185 to 84-1188; 84-1190; 84-1194 to 84-1199; 84-1201; 84-1203; 84-1207 to 84-1208; and 84-1211

RKO General, Inc. (WHBQ) Memphis, Tennessee	MM Docket No. 84-1051 File No. BR-790402CZ
and Associated Dockets	MM Docket Nos. 84-1053 and 84-1056
RKO General, Inc. (WOR) New York, New York	MM Docket No. 84-1122 File No. BR-177
and Associated Dockets	MM Docket Nos. 84-1123 to 84-1124; 84-1126 to 84-1128; 84-1132 to 84-1135; 84-1138 to 84-1140; 84-1142; and 84-1144 to 84-1146
RKO General, Inc. (KFRC) San Francisco, California	MM Docket No. 84-1098 File No. BR-43
and Associated Dockets	MM Docket Nos. 84-1099 to 84-1102; 84-1106; and 84-1110 to 84-1111

MEMORANDUM OPINION AND ORDER

Adopted: June 12, 1985; Released: June 18, 1985

BY THE COMMISSION:

1. Now before the Commission are Petitions for Reconsideration filed by Johnson Communications, Inc. (Johnson)[2] on March 12, 1985 and by New South Media Corporation (New South)[3] on March 27, 1985. Petition-

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[2] Johnson Communications, Inc. is an applicant in the WFYR-FM, Chicago, Illinois comparative renewal proceeding. Opposition pleadings have been filed by other parties to that proceeding, East Lake Communications, Inc. and the Mass Media Bureau. A Motion to Strike Johnson's Petition for Reconsideration has been filed by River City Communications Corporation, an applicant in the WHBQ-TV, Memphis, Tennessee proceeding. In light of our action herein, River City's Motion will be dismissed as moot.

[3] New South is an applicant in the WHBQ-TV, Memphis, Tennessee proceeding. Unlike Johnson, New South failed to serve a copy of its pleading on the other parties affected by our Order, although that Order pertained to the applicants in all nine proceedings.

ers request the Commission to reconsider its *Memorandum Opinion and Order,* FCC 85-80, released February 25, 1985, revising the hearing procedures governing nine comparative renewal proceedings involving 13 broadcast stations licensed to RKO General, Inc. (RKO).[4]

2. In our Order of February 25, 1985 we modified our procedures to permit the parties to these proceedings to commence discovery and hearings on all issues pertaining to both the basic and comparative qualifications of all non-RKO applicants. As noted, Johnson and New South are now seeking reconsideration of our modified procedures. In its Petition for Reconsideration Johnson charges that these modified procedures "would at this stage be premature, burdensome, wasteful and indeed senseless in the extreme under all current circumstances."[5] Johnson favors the previous approach of deferring all comparative consideration until RKO's basic qualifications are finally resolved. Since the conclusions to be reached in the KHJ-TV case concerning RKO's basic qualifications are to be *res judicata* in all other RKO license proceedings, Johnson maintains that it is more sensible to await the outcome of the KHJ-TV case. This would permit a determination as to whether RKO is basically qualified and therefore entitled to a renewal expectancy. It would also permit the parties to better assess their chances of prevailing against RKO without first having to go through the exercise of evaluating the challengers to the RKO licenses.

3. Johnson also argues that, since the bifurcated hearing procedures will result in two comparative hearings (one among the non-RKO applicants and one between the winner of the first hearing and RKO), it will be more costly and time consuming than if normal procedures had been followed. Johnson also faults the Commission for deferring review of the comparative selection process until after the KHJ-TV case is finally resolved. This will mean that the challengers will be confronting not only each other but RKO as well, and all at the same time. Johnson reasons that to protect their rights against RKO, no challengers are likely to drop out of the proceeding, portending an adjudicatory nightmare.

4. Johnson next argues that the present procedures unduly favor RKO. RKO's present role is limited to that of an advocate entitled to attack the qualifications of the other competing applicants. At the same time consideration of RKO's own basic and comparative qualifications is being deferred in these other proceedings. This provides RKO an opportunity to prolong these proceedings and to saddle the competing applicants with debilitating litigation expenses. Johnson asserts that,

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[4] Johnson and New South have also filed Petitions for Stay of their respective proceedings pending the disposition of the underlying Petitions for Reconsideration. In light of our action herein, these Petitions for Stay will be dismissed as moot.

[5] Johnson Petition for Reconsideration, at para. 4.

since RKO will eventually be subject to comparative consideration, there is no reason to permit RKO to participate in the comparative stage of the proceedings involving the other applicants. To do otherwise, as the Commission has ordered, will only result in additional costs and delay to the detriment of the non-RKO applicants.

5. If the Commission chooses not to modify its procedures, Johnson suggests that the other applicants now be permitted to address RKO's basic and comparative qualifications in their respective proceedings. This would require all applicants, including RKO, to establish their qualifications on an equal footing. It would also provide for comprehensive and full comparative hearings in place of the cumbersome piecemeal arrangements now existing.

6. New South echoes Johnson's sentiments to the extent that comparative evaluation of RKO has been precluded. New South contends that the remaining applicants will be forced to incur considerable expense without knowing whether RKO will be vested with a favorable renewal expectancy. New South also argues that the Commission's procedures violate *Ashbacker's*[6] guarantee of a full comparative hearing and is inconsistent with the Court's mandate in *New South Media Corp.* v. *FCC,* 685 F.2d 708 (D.C. Cir. 1982). New South points out that the Court has already admonished the Commission for resorting to dual hearings. In effect, RKO will be receiving special treatment by escaping from the scrutiny of the other competing applicants, while participating in these hearings designed to eliminate all but one competing applicant for each station.

7. New South also claims that the latest Commission procedures will result in outdated final determinations. This is so, New South reasons, because no appeal of these preliminary decisions is contemplated until after RKO's basic and comparative qualifications are finally determined. By the time an appeal is allowed, the record upon which the competing applicants ran will be stale. New South concludes that this "procedure disserves the public interest and places an undue burden on those applicants of adequate but limited means, many of whom are local minority representatives rather than owners with 'deep pockets'."

8. On analysis, we reaffirm use of the latest procedures adopted in these proceedings. Throughout the course of these proceedings we have been guided by two broad public interest concerns. On the one hand is our objective of ascertaining the effect of RKO's disqualification in the Boston proceeding[7] on RKO's overall basic and comparative qualifica-

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[6] *Ashbacker* v. *FCC,* 326 U.S. 327 (1945).

[7] The Boston proceeding refers to the comparative renewal proceeding (Docket Nos. 18759-18761) involving RKO General, Inc., as licensee of WNAC-TV, Boston and two competing applicants, Community Broadcasting of Boston, Inc. and The Dudley Station Corporation. By Decision, *RKO General, Inc. (WNAC-TV),* 78 FCC 2d 1 (1980), the Commission found

tions.[8] Since these findings and conclusions are to be *res judicata* in these nine other proceedings, we have adopted steps to expedite the Los Angeles case. For instance, we have limited inquiry to matters having broad applicability and have afforded all applicants the opportunity to participate in the resolution of these questions in that single proceeding. We have also vested ourselves with exclusive review responsibility.

9. On the other hand, we have also been concerned that those applicants mutually exclusive with RKO's renewal applications be given a not unduly delayed opportunity to show that grant of their respective applications would best serve the public interest, convenience, and necessity. Along these lines the Court has already admonished the FCC for taking steps "destined to prolong by months and in some cases even years licensee RKO's immunity from competitive challenge and comparative evaluation."[9] These latest steps are designed to give the fullest possible force to the Court's mandate.

10. In this regard, our procedures are designed to permit an efficient assessment of the comparative qualifications of the applicants seeking new facilities and to do so with a record uncluttered by questions concerning RKO's basic and comparative qualifications. This can best be accomplished by now allowing each competing applicant to establish its comparative superiority over all other applicants seeking construction permits, a showing that must ultimately be made independent of consideration of RKO's qualifications. This manner of proceeding will also

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RKO not only unqualified as the licensee of WNAC-TV, Boston, Massachusetts, but of Station KHJ-TV, Los Angeles (78 FCC 2d 355) and WOR-TV, New York City (78 FCC 2d 357) as well. The Commission based its conclusion on RKO's lack of candor in not reporting an investigation by the Securities and Exchange Commission (SEC) into the improper corporate practices of the General Tire & Rubber Company, the corporate parent of RKO, and for unequivocally denying charges raised by Community when RKO knew or should have known that there was substantial truth to the allegations raised; for intentionally filing false and improper annual financial reports; and for engaging in illegal reciprocal trade practices. The Court agreed with the Commission's disposition of the WNAC-TV proceeding but on the limited ground that RKO had lacked candor in its dealings with the Commission. *RKO General, Inc.* v. *FCC,* 670 F.2d 215 (1981), *cert. denied,* 457 U.S. 1119 (1982). It then remanded the Los Angeles and New York proceedings for consideration of the impact of RKO's disqualification in Boston on that company's qualifications to remain the licensee of KHJ-TV and WOR-TV. The WOR-TV proceeding (Docket Nos. 1999-92) was subsequently terminated upon RKO's agreement to relocate its VHF channel in Secaucus, New Jersey.

[8] We have chosen the KHJ-TV, Los Angeles proceeding as the forum for resolving generic questions about RKO's overall basic and comparative qualifications arising out of the Boston proceeding. *See RKO General, Inc. (KHJ-TV),* FCC 83-274, 54 Rad. Reg. 2d (P&F) 53, released June 8, 1983; *RKO General, Inc. (WHBQ-TV),* FCC 83-341, 54 Rad. Reg. 2d (P&F) 717, released July 15, 1983 and *RKO General, Inc. (KHJ-TV),* FCC 83-342, released July 19, 1983.

[9] *New South, supra,* 685 F.2d at 715.

assure that, once questions of RKO's qualifications are finally resolved in the Los Angeles proceeding, it will then be a relatively simple matter to compare the qualifications of the preferred competing applicants with those of RKO in the other proceedings.[10] While other alternatives may be available, we believe that this particular method of proceeding will best facilitate an expedited public interest determination.[11]

11. We also reject Petitioners' claims that we are depriving applicants of a full comparative hearing or that we are favoring RKO. To begin with, no applicant is being denied its right to a full comparative hearing or is forfeiting any appellate rights. Nor is any applicant in danger of having its application denied before having a full hearing on its qualifications. *Cf. Ashbacker, supra.* RKO is the subject of 10 renewal proceedings in which its basic and comparative qualifications are under close scrutiny. Competing applicants in these proceedings will have a full opportunity to exercise their rights to raise any relevant questions about RKO's qualifications in their respective proceedings, as well as a right to participate in the KHJ-TV proceeding, pursuant to clearly established guidelines already adopted. RKO will thus be subject to scrutiny by all applicants who choose to remain in these proceedings, and the Mass Media Bureau. In no manner will RKO escape a full examination of its qualifications, albeit such examination will be at a point in time different from that applicable to the non-RKO applicants.

12. Moreover, before a final decision can be reached regarding RKO's basic and comparative qualifications, we recognized that substantial additional information would have to be gathered and considered in the Los Angeles KHJ-TV proceeding. It is just this realization that influenced our determination to consider RKO's qualifications in two separate phases. At the same time, there is no similar reason to delay evaluation of information bearing on the basic and comparative qualifications of the other applicants. Such information is readily obtainable in the context of each respective hearing. Hence, there is no need to await the completion

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[10] As suggested by East Lake in its Opposition to Johnson's Petition for Reconsideration, no party, including RKO, will be entitled to re-litigate the matters now being tried in the present phase of these other proceedings. Hence, the time for all parties, including RKO, to litigate the qualifications of the respective challenging applicants is during the present phase of these proceedings. It is for this reason that RKO is entitled to participate in this phase of the proceeding.

[11] It should also be noted that our most recently modified procedures have had this effect. Over 80 of the originally accepted 171 applications have either been withdrawn or dismissed. This has greatly decreased the burden that the Commission and the remaining applicants would otherwise have had to face in the evaluation of the basic and comparative qualifications of these competing applicants. This circumstance is also expected to expedite the comparative phase of these proceedings and to reduce the consequent costs to all remaining applicants.

of any parallel proceeding to obtain additional decisionally significant information.

13. In sum, we have adopted those procedures which we feel will best conduce to the proper dispatch of Commission business. We have acted within the bounds of the broad discretion which this agency is authorized to exercise over matters of procedure[12] and have afforded all parties the opportunity to comment on the procedures adopted. To this end we reject petitioners' suggestion that we have abused our discretion or have acted in any way inconsistent with the Court's remands in *New South* and *RKO General, Inc.* In those cases the Court in fact declined to impose specific procedures on the Commission, limiting its remand to "such further proceedings, consistent with this opinion, as the Commission shall prescribe." *New South,* 685 F.2d at 718. *See also RKO General Inc. v. FCC,* 670 F.2d at 237 n.48.

14. ACCORDINGLY, IT IS HEREBY ORDERED, That the Petitions for Reconsideration filed March 12, 1985 by Johnson Communications, Inc. and March 27, 1985 by New South Media Corporation ARE DENIED.

15. IT IS FURTHER ORDERED, The the Petition to Strike filed March 28, 1985 by River City Communications Corporation IS DISMISSED as moot.

16. IT IS FURTHER ORDERED, That the Petitions for Stay filed April 5, 1985 by New South Media Corporation and April 8, 1985 by Johnson Communications, Inc. ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[12] *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 138, 143 (1940); *Federal Communications Commission* v. *Schreiber,* 381 U.S. 279 (1965); *Federal Communications Commission* v. *WJR,* 337 U.S. 265, 276, 282 (1949).

Construction Permit, Extension of

Death of legal counsel shortly after grant of TV construction permit is not circumstance beyond permittee's control warranting extension of time, since the permittee must assume responsibility for construction and operation of station. The Commission is now strictly enforcing Section 73.3554(a) of the Rules, and a permittee cannot wait until construction permit is about to expire to proceed with construction.
Sunrise B/Cing, Inc.

Del. Auth. 85-05

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Application of

Sunrise Broadcasting, Inc. (KCKU(TV)) Tyler, Texas	File No. BMPCT-840524KF

For Extension of Time to Construct

MEMORANDUM OPINION AND ORDER

Adopted: April 24, 1985; Released: April 26, 1985

BY THE CHIEF, VIDEO SERVICES DIVISION:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it for consideration: (a) the above-captioned application of Sunrise Broadcasting, Inc. (Sunrise) for an extension of time within which to construct Station KCKU(TV), Channel 14, Tyler, Texas; (b) the Division's August 7, 1984, action denying that application, cancelling the station's construction permit, and deleting its call sign; and (c) Sunrise's September 13, 1984, petition for reconsideration of that action.

2. Initially, there were two applicants for the channel - Sunrise and East Texas Broadcasting, Inc. (ETB). On November 24, 1982, the Chief, Broadcast Facilities Division, approved a settlement agreement that would dismiss ETB's application and grant that of Sunrise. The individual instrumental in the preparation and filing of both Sunrise's application and the settlement agreement was its attorney, Peter Dean, although he

was never a principal of the applicant. He died, however, less than a month after Sunrise's construction permit was granted, and, according to Sunrise, "there was no principal to step-in and serve as an effective mediator of the internal disputes involving certain original Sunrise shareholders." The result was that, after 18 months, construction of the station had not commenced. On May 14, 1984, Sunrise sought an extension of time in which to construct the station, stating that no equipment had been ordered but that construction could be completed by March 24, 1985. On August 7, 1984, however, the Chief, Video Services Division, found that Sunrise had not demonstrated that circumstances beyond its control prevented construction or that there were other matters that would warrant an extension, and the application was denied, the construction permit was cancelled, and the call sign was deleted. Sunrise sought reconsideration of that action on September 13, 1984.

3. In support of its petition for reconsideration, Sunrise argues that Peter Dean's death was an event beyond its control and that "other matters" also exist which would warrant grant of an extension. In that regard, it states that it has now taken several steps toward the construction of the station and is committed to its completion within six months of the reinstatement of its construction permit. For instance, it states that on May 30, 1984, it ordered equipment valued at more than $2,500,000 from Electro Communication Systems, Inc. and paid a $10,000 deposit.[1] Sunrise also reports that, since the denial of its application, it has entered into agreements for the lease of a main studio and for an option to lease a transmitter site and that it paid $1,800 for the option. Sunrise contends that the Commission has held that the death or incapacity of key individuals warrants the grant of an extension of time and that this policy should be applied here. *Beacon Radio, Inc.*, 18 F.C.C. 2d 648 (1969). It further argues that its firm commitment to construct, coupled with its expenditure of funds toward that end, constitute "other matters" warranting a grant. Sunrise adds that Tyler is served by only one other television station and that grant of the extension application would expeditiously promote diversity in the market. *Philip Y. Hahn, Jr.*, 26 F.C.C. 2d 707 (1970). Denial of the extension request, it maintains, would delay the initiation of this second television station to the detriment of the public. Finally, Sunrise argues that this is only its first extension request and that the Commission has in the past granted multiple extensions. *Hartford County Broadcasting Corp.*, 38 F.C.C. 2d 847 (Rev. Bd. 1965); *cf. Telemusic Co.*, 4 F.C.C. 2d 221 (1966) (eighth extension request denied); *cf. Mekaoy Co.*, 48 R.R. 2d 815 (1980) (authorization held for eight years before rescinded).

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[1] The equipment was ordered after the 18-month construction period had expired but before the staff's August 7, 1984 action.

4. Before an extension application can be granted, Section 73.3534(a) of the Rules requires either a specific and detailed showing that the failure to complete construction within the time provided was due to causes beyond a permittee's control or that there are other matters sufficient to justify the extension. Of course, by definition, the circumstances alleged must also be shown to have been crucial to the construction of the station. Consequently, regardless of how tirelessly legal counsel may have championed the cause of an applicant, he was not ultimately responsible for the construction and operation of the station. Just as a licensee must at some point be held accountable for a clear breach of its duty, *RKO General, Inc. v. F.C.C.*, 670 F.2d 215, 231 (D.C. Cir. 1981), *cert. denied,* 456 U.S. 927 (1982), so too must a permittee assume responsibility for the construction and, ultimately, the operation of its station. Consequently, even had Dean lived, it would not have been incumbent upon him to arrange for the construction, and we therefore find no basis for Sunrise's contention that its attorney was vital to the construction of the station and that his death immobilized the permittee for the entire 18-month construction period. Consequently, we cannot find that Dean's death excuses Sunrise's failure to construct the station.

5. We turn now to the question of whether other matters exist which would warrant grant of additional time. Sunrise asserts that it has now ordered equipment worth more than $2,500,000, has entered into an agreement to lease a main studio building, and has obtained an option to lease a transmitter site. As appealing as these actions may appear on their face, there remains the absence of any acceptable reasons why these actions were not taken during the 18-month period allowed for that purpose. A permittee is not entitled to a grant on the basis of a second effort when it literally did nothing prior to the expiration of its time to construct. Just as the Court in *Colorado Radio Corp. v. F.C.C.*, 118 F. 2d 24, 26 (D.C. Cir. 1941), would not "allow the appellant to sit back and hope that a decision would be in its favor, and, when it [was not], to parry with an offer of more evidence," so too we will not allow a permittee to wait until its construction permit is about to expire or has expired and its permit is cancelled to take action. Moreover, we are not impressed with the fact that Sunrise has now paid $11,800 toward the construction of facilities costing in excess of $2,500,000, since that payment represents less than one-half of one percent of the equipment costs. That is not an impressive commitment. *See, Red Carpet Country Television Broadcasting Corp.*, 56 R.R. 2d 1349, 1351 (1984). We further note that the commitment which Sunrise now makes to construct expeditiously is one which it implicitly made when it obtained a grant of its construction permit, and Sunrise's failure to meet that earlier commitment gives us little confidence that it would fulfill its latest one.

6. Finally, with respect to Sunrise's contention that it is receiving disparate treatment by not being afforded even one extension, the cases it cites do not accurately reflect current Commission policy. First, *Mekaoy Co., supra,* involved a reserved television frequency for which no interest had ever been expressed, and it was apparent that, but for Mekaoy, the channel might never be utilized. Here, however, there was a competing applicant for Channel 14 in Tyler. It should also be noted that the policies which allowed multiple extensions in 1965 and 1966 for the construction of FM stations in *Hartford County Broadcasting Corp., supra,* and *Telemusic Co., supra,* no longer exist. See *Revision of Form 301,* 50 R.R. 2d 381, 382 (1981), where the Commission recognized a new "get tough" policy of not extending construction permits for applicants who are either financially unwilling or unable to construct. That the Commission is strictly enforcing Section 73.3554(a) of its Rules is apparent. In the 12 months preceding the filing of Sunrise's extension application, the Commission cancelled 14 television construction permits for failure to construct within the time allotted. Each such action appeared on public notice. Thus, Sunrise may not now be heard to complain that it is receiving disparate treatment because the Commission has been enforcing the rule more strictly than it did 18 years ago.

7. Accordingly, for the reasons stated, above, Sunrise's Petition for Reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
ROY J. STEWARD, CHIEF, *Video Services Division*
Mass Media Bureau

Broadcasting, Re-Regulation
Reregulation of Radio and TV Broadcasting
Television Station, Technical Standards

Report and Order adopted deleting rule specifying maximum durations of horizontal and vertical blanking intervals transmitted as part of video signal by television b/c stations. Technical standards have been established for the video and audio signals transmitted by television b/c stations to ensure compatability with television receivers marketed to the public. Standards that no longer serve a useful regulatory purpose deleted.
—*Television Standards*
BC Docket No. 79-145

FCC 85-123

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Television Waveform Standards Concerning Horizontal and Vertical Blanking Intervals	BC Docket No. 79-145

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 14, 1985; Released: March 22, 1985

BY THE COMMISSION:

Introduction

1. The Commission has under consideration a *Notice of Proposed Rule Making (Notice)*[1] in the above captioned matter and the comments filed in response thereto.[2] The *Notice* proposed to eliminate the maximum vertical and horizontal blanking interval standards from the Rules and

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[1] Adopted on November 19, 1984, 49 *Fed Reg* 47638 (December 6, 1984).

[2] Comments were filed by: American Broadcasting Companies, Inc (ABC); CBS, Inc. (CBS); Richard LaSota (LaSota); Multimedia, Inc (Multimedia); National Association of Broadcasters (NAB); National Broadcasting Company, Inc (NBC); Public Broadcasting Service (PBS); Television Stations WNET, KOSA, WRAU, KCAU, WSAW, WTRF, WMTV, WAFB, WCTV, KGUN, KMTV, KICU, WAKR, WWTV, WWUP, WKRG (TV Licensees). No reply comments were filed.

make such standards available in an OST technical bulletin for good engineering practices. Vertical and horizontal blanking intervals are those periods during which synchronizing pulses are transmitted to control the vertical and horizontal scanning of the television picture. No picture information is transmitted during this time.

2. The Commission's Rules presently specify minimum and maximum timing values for both the horizontal and vertical blanking intervals. Maximum horizontal blanking is 11.44 microseconds and maximum vertical blanking is 21 lines (approximately 1335 microseconds). For several years, there has been a continuing problem with television broadcast signal waveforms exceeding the maximum values contained in the Rules. When this occurs, black borders may appear at the top and left hand side of the picture. Blanking interval width increases are inherent in much equipment used to process video signals and with some video source material.

Background/Comments

3. In 1979, the National Association of Broadcasters (NAB) recommended that the Commission not enforce the maximum vertical and horizontal blanking interval standards for a five year period. This would allow the broadcast industry and equipment manufacturers an opportunity to more fully investigate the problems associated with the blanking interval timing. The Commission adopted this temporary non-enforcement posture and is now in a position to render a final decision in this matter.

4. Most respondents to the *Notice* favored the proposal to remove the maximum vertical and horizontal blanking interval standards from the Rules. The comments indicated that there is a large amount of video material that would not meet either the present standard nor somewhat more liberal standards. This category of material includes instructional television material, some material from Electronic News Gathering efforts, and news footage of historic events. They asserted that this material is of interest to the viewing audience, but correcting such material would be very expensive. In some cases, even after extensive post-processing, some material may still not conform to the blanking intervals currently specified in the Rules.

5. The NAB stated that "the industry has been diligent in attempting to comply with the intent of the blanking rules. Since the proceeding began in 1979, substantial progress has been made by broadcasters and equipment manufacturers to correct the problem, except when there is involved certain archival program material. The heightened awareness of blanking standards, created by this proceeding, has served an important purpose."

6. Only one comment was received which opposed the removal of the standards on the premise that "resistance to the standards was based on

the absence of available, reasonable priced equipment for monitoring the width and position of blanking signals." The commenter stated that he has developed in inexpensive monitoring device which will detect excessive blanking intervals. However, the cost of measurement equipment is not an issue in this proceeding because stations already do have monitoring equipment capable of making these measurements. Furthermore, measurement equipment does not appear to be a factor affecting the underlying causes of the blanking interval problems.

Discussion

7. The five year hiatus in enforcement of the blanking interval standard has passed and it now appears that a marketplace approach is warranted. Incorrect blanking interval timing affects only the viewers of a particular station. Other co-channel and adjacent channel stations are not affected. So the standard is really one of on-channel quality, not interference. Furthermore, there is no indication in the record that non-enforcement of the blanking intervals standards has resulted in viewer dissatisfaction with TV pictures during this period.

8. Competition is keen among broadcasters and other video suppliers, and a strong incentive exists for each station to supply the best possible picture. However, market demands may dictate a tradeoff between blanking interval timing and choices of available programming. For example, much of the archival material may not meet the standards, but such programming may be of great interest to a station's viewing audience. Government regulations should not impede the airing of such material nor require that the material undergo expensive processing prior to airing. We are confident that the broadcasters will exercise good judgment and keep their audiences in mind when choosing and supplying programming. Therefore, it seems appropriate to remove the maximum blanking interval standards from the Rules.

9. Accordingly, the current maximum blanking interval standards will be designated as recommended limits. This will provide guidance to broadcasters, production houses, and manufacturers, and will permit judgments consistent with programming needs. We would hope that eventually the industry will set its own voluntary guidelines in such quality areas.

10. Regulatory Flexibility Final Analysis

I. Reason for action: The current Rules prescribe transmission standards that cannot be met by broadcasters for several sources of program material. This action should eliminate that dilemma.

II. The objective: The Commission's action is designed to provide broadcast licensees with more freedom in choosing program material without the fear of violating FCC technical rules.

III. Legal basis: Action is proposed in accordance with Sections 303(g) and (r) of the Communications Act of 1934, as amended, which charges the Commission to encourage the most effective use of radio in the public interest.

IV. Description, potential impact, and number of small entities affected: The rule changes should favorably affect all television broadcast stations and viewers by eliminating technical rules that now restrict the transmission of certain video material, if the material exceeds the allowed horizontal or vertical blanking interval limits.

V. Recording, recordkeeping, and other compliance requirements: None.

VI. Federal Rules which overlap, duplicate, or conflict with this Rule: None.

VII. Any significant alternatives minimizing impact on small entities and consistent with the stated objective: None.

Paperwork Reduction Act

11. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

Actions

12. The Secretary shall cause a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 50 U.S.C. 601 *et seq.)*

13. Accordingly, IT IS ORDERED that Part 73 of the Commission's Rules IS AMENDED as set forth in the attached Appendix, to be effective upon adoption pursuant to Section 5 U.S.C. s/s 553(d)(i). IT IS FURTHER ORDERED that this proceeding IS TERMINATED. Authority for the action taken herein is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

14. Further information on this proceeding may be obtained by contacting Hank VanDeursen, Mass Media Bureau, (202).632-9660.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

Title 47 of the Code of Federal Regulations, Part 73 is amended as follows:

1. Section 73.669 Figure 6 would be amended by adding a new "Note" 19 to read as follows:

73.699 TV engineering charts

NOTES

* * * * *

19 Maximum horizontal and vertical blanking intervals are recommended values only.

2. Section 73.699 Figure 7 would be amended by adding a new "Note" 12 to read as follows:

73.699 TV engineering charts

NOTES

* * * * *

12 Maximum horizontal and vertical blanking intervals are recommended values only.

3. Section 73.4270 entitled *TV broadcast signals: Technical standards* is removed in its entirety.

Character Qualifications
Comparative Criteria
Diversification, of Control Mass Media, See Also Control
Ownership and Management, Integration of
Renewal, Applicant v. New Applicant
Specialized Programming

Commission reverses Review Board and finds renewal applicant preferred on comparative grounds over mutually exclusive applicants. Renewal expectancy granted based on most recent license term although incumbent's renewal application held in deferred status for extended period. Misconduct at co-owned stations warrants only slight demerit in view of incumbent's remedial measures, nonrecurrence of misconduct, and deterrent impact of losing co-owned stations.

United Broadcasting Co., Inc.
BC Docket No. 80- 479

FCC 84-639

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
United Broadcasting Company, Inc. Washington, D. C.	BC Docket No. 80-479 File No. BRH-589.
For Renewal of License of Station WOOK(FM) Washington, D. C.	
District Broadcasting Company Washington, D. C.	BC Docket No. 80-480 File No. BPH-780831AY
Hispanic Broadcasting Corporation Washington, D.C.	BC Docket No. 80-481 File No. BPH-780901AB
For Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1984; Released: January 14, 1985

BY THE COMMISSION: COMMISSIONERS FOWLER; CHAIRMAN, NOT PARTICIPATING; COMMISSIONER RIVERA DISSENTING AND ISSUING A STATEMENT.

I. Introduction

1. United Broadcasting Company, Inc. (United) seeks renewal of its license to operate Station WOOK(FM), Washington, D. C. District Broadcasting Company (District) and Hispanic Broadcasting Corporation (Hispanic) have filed mutually exclusive applications for construction permits. Administrative Law Judge Frederic J. Coufal (ALJ) granted District's application on comparative grounds, ranking Hispanic second and United last,[1] and the Review Board, while modifying the Initial Decision in some respects, affirmed.[2] The Board held that United was not entitled to a renewal expectancy based on its past operation of WOOK(FM). Considering WOOK(FM)'s record since 1966, the last year its license was renewed, the Board found that WOOK(FM)'s past performance was only minimal. Moreover, the Board assessed a substantial demerit against United for disqualifying misconduct occurring at two of United's co-owned stations.[3] Under the comparative issue, District and Hispanic received a diversification preference over United because they own no outside media interests. District received a moderate preference over the other applicants for integration and a slight preference for auxiliary power. Hispanic received a slight preference for specialized programming and a slight demerit for a reporting violation.

2. We have considered the parties' Applications for Review[4] and found that review of the Board's Decision in this proceeding is warranted. Except as modified herein, however, that Decision is adopted. At the outset, we wish to make clear that we disagree with crucial aspects of the Board's Decision. Consequently, and for the reasons which follow, we conclude that, although this case involves close and difficult questions, the public interest rationale underlying the comparative renewal process ultimately favors granting renewal of United's license for station WOOK(FM).

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[1] *United Broadcasting Co., Inc.*, 94 FCC 2d 960 (Admin. L.J. 1982).

[2] *United Broadcasting Co., Inc.*, 94 FCC 2d 938 (Rev. Bd. 1983).

[3] United is a multiple owner. In 1975 the Commission denied renewal to co-owned Stations WOOK(AM), Washington, D. C. and WFAB, Miami, Florida for misconduct resulting from negligent management. United also owns 10 other stations.

[4] United and Hispanic filed Applications for Review and District filed a Contingent Application for Review on October 7, 1983. The parties, including the Mass Media Bureau, filed Oppositions on November 7, 1983.

II. United's Past Record

A. Relevant Time Period

3. In 1969, United's renewal application for WOOK(FM)[5] was placed in deferred status because of questions concerning misconduct at two of United's co-owned stations, WOOK(AM), Washington, D.C., and WFAB, Miami, Florida. As a result, the license for WOOK(FM) has not been renewed since 1966. United filed supplemental renewal applications in 1972, 1975, and 1978. District and Hispanic filed against the 1978 application. United relies on its 1975–78 record in seeking to establish that its performance has been substantial and therefore deserving of a renewal expectancy.

4. Both the ALJ and the Board rejected United's argument that only its most recent license term, 1975–78, is relevant in determining whether it was entitled to a renewal expectancy.[6] The ALJ noted that WOOK(FM)'s performance had improved after 1975, when the Commission had issued Decisions denying renewal of licenses for United's co-owned stations.[7] He held that the Commission considers valueless a record compiled under the threat of license nonrenewal and, accordingly, gave the 1975–78 record diminished weight. The Board, stressing the principle that a licensee runs on its record, also rejected United's argument that only its 1975–78 record should be examined. The Board explained that United is answerable for its performance for the entire period since its license was last renewed and that United was on notice that it should be prepared to document that record. However, the Board disagreed with the ALJ's rationale for not giving significant weight to United's improved performance after 1975. The Board reasoned that it was arbitrary to choose 1975 as the date when United was put on notice that its license was in jeopardy because the license had been in deferred status since 1969. The Board considered it more reasonable to apply the principle traditionally used in comparative renewal proceedings of excluding consideration of the incumbent's record only after the filing of competing applications — here, in 1978. Indeed, the Board concluded that the 1975–78 license term was the most reliable predictor of future service.

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[5] Prior to 1976, the station was identified as WFAN(FM) and had a Spanish language format. In 1976, the station switched to a Black format and became WOOK(FM). To avoid confusion the station will be referred to as WOOK(FM) throughout.

[6] 94 FCC 2d at 940-41, 949-50, 990-92.

[7] United submitted evidence only as to WOOK(FM)'s broadcast record during the 1975-78 license term. The ALJ concluded that this record was substantial. *See* para. 9 *infra*. Based on evidence submitted mainly by District, the ALJ concluded that prior to 1975, WOOK(FM)'s record had been deficient in local news, and in nonentertainment programming other than news.

5. In its Application for Review, United renews its argument that only the 1975–78 time period should be considered in determining whether WOOK(FM)'s past record has been substantial. United argues that in the typical license renewal proceeding the Commission considers only the license term immediately preceding the filing of competing applications, especially since the most recent record is the most reliable predictor of future service. United also observes that placing its renewal application in deferred status was not based on any difficulties at WOOK(FM). United asserts that it is unreasonable to expect it to document its performance over four license terms, since the relevant evidence is unavailable.

6. The Mass Media Bureau responds that the Board was correct in holding United responsible for its record since its license was last renewed. The Bureau also accuses United of failing to demonstrate that it made a good faith effort to document its pre-1975 performance. Hispanic contends that United should not be able to escape responsibility for its performance merely because the Commission chose to put the WOOK(FM) renewal application in deferred status instead of designating it for hearing immediately. Hispanic also argues that United must run on its record since 1966. District contends that a review of the 1966–75 time period is necessary to justify granting the 1969, 1972, and 1975 supplemental renewal applications. Additionally, District submits that the post-1975 record has little significance when the pre-1975 deficiencies are considered.

7. We disagree with the Board's treatment of this matter. Indisputably, a licensee does run on its record.[8] However, the specific question involved here appears to be one of first impression; neither the Board nor the parties cite any precedent directly on point. Ordinarily, a determination of whether a licensee's record has been substantial, and thus warrants a renewal expectancy, focuses on the license term preceding the filing of the renewal application in question.[9] We believe United lacked notice that this principle would not apply in the instant case and, therefore, that it should have accumulated and preserved evidence to demonstrate substantial performance. The fact that the Commission placed United's 1969 renewal application in deferred status did give notice to United that questions existed regarding its basic character qualifications to remain a licensee. Accordingly, United should have known that it would be required to vouch for its record insofar as the recurrence of

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[8] *See, e.g., Office of Communication of the United Church of Christ* v. *FCC,* 359 F.2d 944, 1007 (D.C. Cir. 1966).

[9] *See Cowles Broadcasting, Inc.,* 86 FCC 2d 993 (1981), *aff'd sub nom. Central Florida Enterprises, Inc.* v. *FCC,* 683 F.2d 503 (D.C. Cir. 1982), *cert. denied,* 103 S.Ct. 1774 (1983); *Broadcasting Renewal Applicant,* 66 FCC 2d 419, 429 (1977), *aff'd sub nom. National Black Media Coalition* v. *FCC,* 589 F.2d 578 (D.C. Cir. 1978); *RKO General, Inc.,* 35 FCC 2d 100, 103 (1972).

misconduct giving rise to the deferral of license renewal.[10] On the other hand, the deferral of United's 1969 renewal application did not, in itself, imply that United would have to demonstrate its entitlement to a renewal expectancy, *viz,* to demonstrate substantial performance. That became necessary only because competing applications were filed in 1978.[11] Because no competing applicants filed against United in 1969, 1972, or 1975, the Commission could have granted renewal at that time without consideration of whether United's record had been substantial and, therefore, without delving into questions of programming. Thus, United had reason for believing that its obligation to demonstrate the substantiality of its past programming record against the challenge of a competing applicant had been discharged for those years. Because the deferral was based on outstanding character issues against commonly owned stations United did not have notice that it later would be required to document its 1966–75 record with respect to its programming. We will therefore focus on the years 1975–78 in determining whether United merits a renewal expectancy.

8. In reaching this conclusion, we have nevertheless examined, to the extent the record permits, United's pre-1975 record. As the Board concluded, that record is scant and not adequate to make a full analysis of whether United deserves a renewal expectancy. On the other hand, it does not indicate that United's performance was so inadequate as to be minimal.[12] As the ALJ correctly found, that record — sketchy as the data is — nevertheless compels a determination that the amount of nonentertainment programming broadcast by WOOK(FM) compared favorably with that of other FM stations in the market.[13] Indeed, Hispanic's own

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[10] *Cf. Lamar Life Broadcasting Co.,* 14 FCC 2d 431 (1968) *rev'd on other grounds sub nom. Office of Communication of the United Church of Christ* v. *FCC,* 425 F.2d 543 (D.C. Cir. 1969), in which the Commission reexamined misconduct occuring in a prior license term because of allegations that such misconduct had recurred. As will be seen the instant record is adequate to evaluate this question.

[11] The filing of a supplemental renewal application triggers the right of competing applicants to file. *Carlisle Broadcasting Associates,* 59 FCC 2d 885 (1976). If the Commission had immediately designated WOOK(FM)'s renewal for hearing in 1969, instead of deferring consideration, no competing applications could have been filed and United would have had no obligation to demonstrate a renewal expectancy. *Committee for Open Media* v. *FCC,* 543 F.2d 861 (D.C. Cir. 1976).

[12] *Compare Simon Geller,* 90 FCC 2d 250 (1982), *rev'd on other grounds sub nom. Committee for Community Access* v. *FCC,* 737 F.2d 74 (D.C. Cir. 1984).

[13] 94 FCC 2d at 963-68, 990-91. While the ALJ correctly found that WOOK(FM) had broadcast comparable amounts of news to other AM and FM stations in the market, he erred in finding that WOOK(FM) had broadcast among the least total nonentertainment programming. This error apparently occurred because the ALJ compared the *total* nonentertainment programming of other AM and FM stations for 1975-78 listed in United Exh. 76 with the *other* nonentertainment programming presented by WOOK(FM). In fact, confining attention to 13 Washington area FM radio stations for

principals testified that WOOK(FM) has provided a valuable service to the Hispanic community during those years.[14] In any event, and absent an affirmative showing the United has acted in bad faith,[15] we believe for the reasons previously stated that we should not hold United accountable for the inadequacy of its pre-1975 programming record, without notice that it should have retained program related evidence.[16] We further note that we are limiting our examination to the 1975–78 license term only for purposes of determining whether there was substantial performance to warrant a renewal expectancy and not for purposes of examining United's character. For the latter, we have examined the entire period since the last renewal.

B. Evaluation of Past Record

9. The ALJ found that during the 1975–78 license term, WOOK(FM)'s broadcast record had been substantial following its change in format.[17] The amount of time WOOK(FM) devoted to nonentertainment programming compared very favorably with that of 35 Washington, D.C. metropolitan area AM and FM stations for which information was available, including several with primary nonentertainment formats. WOOK(FM)'s 1978 renewal application indicated that the station ranked 8th with respect to the total amount of news broadcast and 10th with respect to the percentage of time devoted to news. WOOK(FM) ranked 15th with respect to the total amount of nonentertainment programming presented and 16th with respect to the amount of time devoted to nonentertainment programming. United also presented evidence of an April 1978 program audit, giving figures more current than those contained in the composite week reported in the 1978 renewal application.

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which data is provided in United Exh. 76, WOOK(FM) ranked as follows. For percentage of news, WOOK(FM) ranked 4th in 1969, 6th in 1972, and 1st in 1975; for percentage of total nonentertainment programming, WOOK(FM) ranked 3rd in 1969, 2nd in 1972, and 1st in 1975. WOOK(FM) did, however, rank low in local news and public affairs. *See* District Exh. 16. It is most appropriate to compare WOOK(FM)'s performance with that of other FM stations since only in relatively recent years have FM stations begun to achieve competitive equality with AM stations, and since FM stations are more comparable with each other in terms of operations than with AM stations. See *Broadcast Communications, Inc.*, 93 FCC 2d 1176 (Admin. L.J. 1982), *aff'd*, 93 FCC 2d 1162 (Rev. Bd. 1983), *modified*, 55 RR 2d 997 (1984), *appeal docketed sub nom. Genesis Broadcasting, Ltd.* v. *FCC*, No. 84-1154 (D.C. Cir. April 18, 1984).

[14] 94 FCC 2d at 971, 995.

[15] Licensees have been required to retain logs for a period of only two years. Section 73.1840 of the Commission's Rules, 47 C.F.R. §73.1840.

[16] *Cf. Radio Athens, Inc. (WATH)* v. *FCC*, 401 F.2d 398 (D.C. Cir. 1968).

[17] 94 FCC 2d at 963-71, 990-92, 994-95. *See also* United Exh. 63. WOOK(FM)'s programming was changed on December 24, 1976 from Spanish language to a Black format. The composite week reported in WOOK(FM)'s 1978 renewal application included dates both before and after the format change.

The audit indicated that WOOK(FM) broadcast 10.7% news, 2.4% public affairs, and 3.1% other nonentertainment programming, for a total of 16.2%. These figures ranked 7th among area stations in news and 12th in overall nonentertainment programming.[18]

10. WOOK(FM) had a three person news staff and a news director. One member of the staff was in the field daily covering local events. The station was formerly affiliated with the National Black Network and later the Sheridan Broadcast Network and used the Associated Press wire service. The station broadcast regular news programs including *Information Digest,* which is roughly one-third locally produced. The station also carried special news broadcasts of interest to the local community. Additionally, WOOK(FM) carried *Commentline,* during which listeners' were asked to call in and comment on public issues, a regular report by the District Mayor's Office, a physical exercise program, a regular report on job opportunities, and a program on how to save money in the home. As shown by United Exh. 63, WOOK(FM) broadcast several public affairs programs dealing with issues of interest to the local community. These included: *Checkpoint,* an interview program featuring community leaders; *D.C. Report,* featuring interviews with District of Columbia government officials and programming provided by the National Black Network; *Community Roundtable,* a roundtable discussion program including community leaders; *Viewpoint,* a discussion program featuring community leaders; and *Women's Forum,* a discussion program dealing with issues of particular concern to women. Among the issues dealt with by these programs were health, housing, education, employment, energy, transportation, crime, women's issues, minority issues, youth issues, the economy, drugs, and the elderly. WOOK(FM) also broadcast numerous public service announcements.

11. WOOK(FM) conducted a number of community related activities. These included: (1) a free class for training in radio broadcasting; (2) participation in the Salvation Army Christmas drive to collect toys for needy children; (3) co-sponsoring a community-wide Mardi Gras Day to promote the revitalization of the 14th Street corridor; (4) conducting a high school attendance contest; (5) furnishing speakers to a local high school; (6) donating tickets to the Metropolitan Police Boys and Girls Clubs; (7) assistance with the Temporaries Food for Christmas Collection; and (8) co-sponsoring a teen benefit disco with the YWCA.

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[18] As previously mentioned in note 13 *supra,* the more appropriate comparison is with respect to the 13 area FM stations. These rankings were as follows. Based on the 1978 renewal application WOOK(FM) ranked 4th in amount of news broadcast, 4th in percentage of time devoted to news, 4th in amount of nonentertainment programming broadcast, and 3rd in percentage of time devoted to nonentertainment programming. Based on the April 1978 audit, WOOK(FM) rated 1st in percentage of news and 2nd in percentage of total nonentertainment programming.

12. As recited at para. 33 of the Initial Decision, a number of community witnesses praised WOOK(FM)'s performance, not only on its own terms but also, in several instances, in comparison with other area stations. These included a number of the D. C. City Council, a counselor in a juvenile detention center, a program coordinator for a local alcoholism program, an educator in the D. C. public school system, a director of a community-based drug treatment center, a member of Wider Opportunities for Women, a director of Youth Services and Advocacy of the Southeast Neighborhood House, Inc., the president of an employment agency, the founder of a local community center, and several members of the Black community. Each testified that WOOK(FM) had well served the various needs and interests of the community. No witness criticized WOOK(FM)'s performance.

13. We find that this record amply supports the conclusion that WOOK(FM)'s performance has been substantial and warrants a renewal expectancy. In particular, the testimony of the community witnesses paints on impressive picture of WOOK(FM)'s responsiveness to the varied needs and interests of the community it serves. As we have held, a station's regular listeners are in the best position to judge the station's performance.[19] Here, a number of witnesses testified that WOOK(FM)'s service to the community exceeded that of other area stations. We have previously stated and the court has agreed that licensee responsiveness to community needs and interests as demonstrated by community witnesses and similar indicia is critical in determining whether a licensee has performed meritoriously.[20] The evidence discussed in paras. 9–12 amply demonstrates that United has substantially responded to the needs and interests of the community. Accordingly, we find that United is entitled to a renewal expectancy to be taken into account in the overall comparative evaluation. Indeed, neither the Board nor any of the parties question the ALJ's characterization of WOOK(FM)'s 1975–78 performance as substantial following the format change. However, District and Hispanic point out that the format change did not occur until more than one-third of the license term has expired. Nevertheless, we agree with the Board that WOOK(FM)'s most recent performance is most probative.

III. United's Past Misconduct

14. In 1975, the Commission denied renewal of licenses for United's co-owned stations WOOK(AM), Washington, D. C. and WFAB, Miami, Florida. Denial of WOOK(AM) resulted from: (1) the use of WOOK(AM)

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[19] *Radio Station WABZ, Inc.*, 90 FCC 2d 818, 842 (1982), *aff'd sub nom. Victor Broadcasting, Inc.* v. *FCC,* 722 F.2d 756 (D.C. Cir. 1983).

[20] *Simon Geller, supra* note 12; *Radio Station WABZ, Inc., supra* note 19; *Cowles Broadcasting, Inc. supra* note 9.

by various ministers to disseminate numbers game information in violation of the Commission's lottery rule, and false and misleading advertising concerning promises of financial blessings and solutions to personal problems, (2) the broadcast of advertising subject to a Federal Trade Commission warning and advertising which violated Federal Trade Commission guidelines, and (3) repeated violations of the Commission's technical rules despite the assessment of a $7500 forfeiture.[21] These derelictions occurred during 1966–69. The Commission denied renewal of WFAB because of fraudulent billing during 1971–72.[22] United's management, particularly its then owner and president Richard Eaton, who died in 1981, was found to have been culpable of nonsupervision in both cases.

15. In response to this misconduct United instituted several remedial measures between 1973 and 1978.[23] A director of operations was hired to develop and implement policies and procedures with respect to compliance with Commission rules and policies. Both he and communications counsel are available for consultation with station personnel. United's consulting engineers began a program of unannounced periodic technical inspections. United established a central billing procedure, began an educational program regarding the elements of a lottery, and developed procedures for reviewing all contests prior to their broadcast. Consultation for station employees concerning advertising is also available. United enforces a policy against accepting gifts in connection with broadcasting. Management personnel check United's stations for technical compliance.

16. Despite these curative steps, misconduct occurred at WOOK(FM) itself, resulting in the assessment of a $6,000 forfeiture.[24] These violations concerned two contests conducted over WOOK(FM) in 1977 and 1978. In one contest, announcers failed to disclose the nature of the prizes and made the false statement winners of the contest would qualify to win in any WOOK(FM) contest conducted that year. In the other contest, announcers erroneously stated that calls would be placed to listeners in the Washington area, when, in fact, no calls were placed to the Virginia suburbs.[25]

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[21] *United Broadcasting Co., Inc.*, 55 FCC 2d 416 (1975), *recon. denied,* 59 FCC 2d 663 (1976), *aff'd,* 565 F.2d 699 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1046 (1978) (The Court of Appeals affirmed the denial of WOOK(AM), reaching only the issue of technical violations).

[22] *United Broadcasting Company of Florida, Inc.*, 55 FCC 2d 832 (1975), *recon. denied,* 60 FCC 2d 816 (1976).

[23] 94 FCC 2d at 974-75.

[24] *Id.* at 971-73.

[25] District urges that the issues against United should be enlarged to inquire into additional alleged misconduct at WOOK(FM). In District's view, inquiry should be made into United's employment practices because the Commission raised a question as to the adequacy of WOOK(FM)'s EEO program. *See Renewals of Certain D.C. Broadcasting Stations,* 77 FCC 2d 899 (1980). The Commission's action, which was taken prior to the

17. The ALJ held that the death of Richard Eaton precluded a finding that United's past misconduct at WFAB and WOOK(AM) was disqualifying but that it did affect the comparative evaluation.[26] The ALJ imposed a substantial demerit based primarily on the misconduct at stations WOOK(AM) and WFAB. He discounted the remedial measures because of their belated nature and because of the recurrence of misconduct at WOOK(FM). Howeer, he considered the contest violations at WOOK(FM) to be of minor significance.

18. The Board affirmed the ALJ's imposition of a substantial demerit against United.[27] However, the Board did not rely on Eaton's death as a mitigating factor, because other members of United's management, implicated in the wrongdoing, continue to be involved with WOOK(FM). In the Board's view, United's remedial measures, the fact that serious misconduct did not occur at WOOK(FM), and the fact that the misconduct involved was the result of negligence and not deliberate actions militated against disqualification but not against a substantial demerit, given the fact that WOOK(AM)'s station management survived virtually intact at WOOK(FM). The Board held that this demerit would have offset any renewal expectancy based on WOOK(FM)'s overall programming.

19. United maintains that the Board gave excessive weight to its past misconduct. United points out that most of the misconduct is remote in time and unrelated to the operation of WOOK(FM). United also submits that although its remedial measures might be considered belated with respect to WOOK(AM) and WFAB, they are timely with respect to WOOK(FM). Additionally, United argues that the Board failed to take into account the deterrent effect of losing Stations WOOK(AM) and WFAB. United urges that a multiple owner should not be subject to unlimited sanctions for past misconduct. The Mass Media Bureau concedes that the Board did not fully take into account the impact of deterrence but otherwise supports the Board's Decision. District suggests that United should be disqualified and not merely assessed a comparative demerit.

20. In *Faulkner Radio, Inc.*,[28] a recent case, we discussed the elements we would consider in evaluating the effect of misconduct at one station on a licensee's fitness to retain its other stations. We identified three pertinent factors in this analysis: (1) the nature of the misconduct; (2) the likely deterrent effect of losing the previous license, and (3) the

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designation of this proceeding for hearing, does not justify adding an issue here. While noting a variance with its employment guidelines for women, the Commission found no violation of its nondiscrimination policy. In the absence of a substantial question in this regard, further action here is unwarranted.

[26] 94 FCC 2d at 992-94.

[27] *Id.* at 941-47, 950.

[28] 88 FCC 2d 612 (1981).

attribution of responsibility within the licensee.[29] We weighed these factors cumulatively rather than independently. Applying these factors to the instant case, we agree with the decisions below characterizing the misconduct that occurred at WOOK(AM) and WFAB as serious and pervasive. The further fact that some principals of WOOK(AM) remain principals of WOOK(FM), despite the death of Richard Eaton, is also significant. Indeed, this appears to have been the Board's prime concern along with the recurrence of misconduct in 1978 in assessing a substantial demerit against United.

21. Otherwise, we disagree with the Board's conclusions in this regard. We believe that the Board gave insufficient weight to various factors mitigating the impact of the misconduct at WOOK(AM) and WFAB on WOOK(FM). The Board gave little credit to United for its remedial measures following the misconduct at the two AM stations.[30] It did so on the theory that giving credit for "belated" correctional measures would effectively relieve licensees of all responsibility for station operations. This argument may be pertinent with respect to remedial measures instituted *post hoc* at the station where the serious misconduct occurred. However, this argument loses whatever force it has when applied to remedial measures instituted prospectively to prevent a recurrence of misconduct at co-owned stations. Here, United has adopted a stringent system of combined external and internal controls designed to address the problem areas which led to the violations at WOOK(AM) and WFAB. We find that these measures are substantial and persuasive of United's ability to prevent further serious misconduct at WOOK(FM), notwithstanding its prior difficulties at WOOK(AM) and WFAB.

22. The institution of pervasive remedial measures mitigates the fact that principals associated with WOOK(AM) remain associated with WOOK(FM). We state this with the realization that in many past cases we have looked with favor on removal of the wrongdoers as a form of corrective action.[31] Nevertheless, we find that in the instant case retention of the affected principals is not an absolute bar to renewal. In this case, the principals in question were not active wrongdoers; rather, they were implicated in a failure to supervise station operations. Thus, extrinsic evidence indicating that station operations will now be effectively supervised through the superimposition of a rigorous system of internal

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[29] This list was not intended to be exhaustive. As will be seen, two additional factors are relevant here: the licensee's remedial measures and the broadcast history of co-owned stations.

[30] 94 FCC at 945.

[31] *See, e.g., Faulkner Radio, Inc.*, note 28 *supra*, and *Gross Telecasting, Inc.*, 92 FCC 2d 204 (Rev. Bd. 1982). *Compare American Broadcasting Cos., Inc.* 52 RR 2d 1378 (1982), wherein a principal in question was promoted and shifted to a new position with the licensee.

and external checks and reviews negates the significance of continued participation by these common principals, and their severance from the licensee is not a prerequisite to finding the licensee comparatively well qualified.

23. Second, we believe that the Board gave insufficient weight to its own observation that WOOK(FM) has a different broadcast history from WOOK(AM) or WFAB.[32] Despite the apparent pervasiveness of the problems at WOOK(AM) and WFAB, no misconduct of a similar magnitude has occurred at WOOK(FM). In this regard, we agree with the Board and do not consider the contest violations at WOOK(FM) to approach the severity of the deficiencies at the two AM stations, which represented repeated serious violations of the Commission's Rules over an extended period of time. The contest violations involved isolated inadvertent defects in the running of two contests. Although the recurrence of misconduct is generally relevant to assessing a licensee's qualifications, we believe that the type of misconduct which recurs is also significant. Subsequent minor derelictions do not become major ones merely because misconduct of a more serious nature occurred in the past. In this case, the past misconduct at WOOK(AM) and WFAB does not alter the fact that the record of WOOK(FM), the station at issue here, has been without significant blemish.

24. Finally, we do not believe the Board gave adequate consideration to the factor of deterrence. The nonrenewal of its two broadcast licenses represented a massive loss to United, calculated to impress on it and others the seriousness with which the Commission views abdications of licensees' responsibilities. On the contrary, the record shows that the performance of WOOK(FM) during the 1975-1978 renewal period amply demonstrates that loss of the two AM stations has had a direct and salubratory effect on the broadcast service provided by WOOK(FM). In the face of such a loss and the other factors previously mentioned, we have no reason to believe that the misconduct leading to that sanction will be repeated by United. It is our view that sanctions for broadcast misconduct should be reasonably tailored to deter misconduct by the involved broadcaster and others. A failure to set reasonable limits on the sanctions imposed on a multiple owner for misconduct affecting only some stations would render these sanctions excessive and contrary to the public interest.

25. The record before use requires a difficult balancing of pluses and minuses. For the reasons indicated, we conclude that pluses predominate, that the misconduct at WOOK(AM) and WFAB and the more recent misconduct at WOOK(FM) does not significantly detract the United's qualifications to be a licensee, and that it warrants only a slight

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[32] *Id.* at 944-45.

comparative demerit.[33]

IV. The Standard Comparative Issue

A. Specialized Programming

26. United and District propose Black programming formats, while Hispanic proposes a Spanish language format. Hispanic's proposed service area has a Hispanic population of about 93,000 (3%); approximately 25% of these do not speak English. Six area stations carry some Spanish language programming, and one, WMDO, a daytime only AM station, broadcasts entirely in Spanish. Because he believed that WMDO represented a meaningful amount of Spanish language programming available in the community, the ALJ did not give any preference to Hispanic for its specialized format.[34] The Board modified the Initial Decision, noting that the area has no nighttime aural Spanish language service. However, the Board found no basis for giving Hispanic a substantial preference.[35] The Board observed that existing Black format radio stations (3 commercial and 1 noncommercial) could not be considered abundant, considering that Washington, D. C., the community of license, has a large (70%) Black population. The Board awarded Hispanic only a slight preference for its specialized format.

27. Hispanic argues that constitutional considerations require giving it a substantial preference based on its Spanish language format. Relying on *Lau* v. *Nichols*,[36] Hispanic asserts that the Commission has a responsibility to ensure that Spanish speakers have a meaningful opportunity to benefit from the mass media by providing for Spanish language programming.

28. The Board's treatment of this issue is consistent with Commission policy.[37] The Commission's overriding concern in limiting the consideration of specialized programming is that the choice of formats is a subjective, discretionary matter best left to the broadcaster. For this reason, the Commission distinguishes between applicants based on their proposed formats only where there is a clear public interest benefit in so doing. A choice between two specialized formats, neither of which is abundant in the community of license and neither of which is wholly absent, provides little reason to make a distinction. We therefore affirm

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[33] *Accord, WIOO, Inc.*, 95 FCC 2d 974 (1983).

[34] 94 FCC 2d at 983-90, 995-97. *See George E. Cameron Jr. Communications,* 71 FCC 2d 460 (1979); *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090 (Rev. Bd. 1982); *Flint Family Radio, Inc.*, 69 FCC 2d 38 (Rev. Bd. 1977).

[35] 94 FCC 2d at 950-53. *Compare Broadcast Communications, Inc.*, 93 FCC 2d 1162 (Rev. Bd. 1983), *modified,* 55 RR 2d 997 (1984), *appeal docketed sub nom. Genesis Broadcasting, Ltd.* v. *FCC*, No. 84-1154 (D.C. Cir. April 18, 1984).

[36] 414 U.S. 563 (1974).

[37] Cases cited *supra* note 34.

the Board's award of a slight preference to Hispanic over District and United.

29. *Lau* v. *Nichols,* relied on by Hispanic concerned the obligation of a State under the Civil Rights Act of 1964 to provide educational instruction for non-English speaking students. We do not discern the applicability of this case to making a choice among broadcast applicants.

B. Integration of Ownership Into Management[38]

30. District proposes the full time integration of its 25% stockholder Herman F. Stamps, as the proposed station's managing director. Stamps is a local resident and Black. Neither Hispanic nor United proposes any full time integration. However, both are entitled to slight residual credits for the part time integration of minorities.

31. Hispanic argues on several grounds that District is not entitled to integration credit for its proposal to integrate Stamps. Hispanic asserts that the position of managing director is not recognized by the Commission's 1965 *Policy Statement on Comparative Broadcast Hearings.*[39] Hispanic further asserts that District did not specify Stamps' duties until after the time that comparative upgrading was barred. Hispanic also considers the description of Stamps' duties as managing director excessively vague. Finally, Hispanic contends that the integration of only a 25% owner into management does not warrant a moderate preference.

32. These arguments are without merit. It is insignificant that the position of managing director is not listed in the 1965 *Policy Statement.* The listing in the *Policy Statement* was not intended to be all inclusive; other significant management positions are entitled to credit.[40] Moreover, the Commission's Rules do not prohibit District from elaborating on Stamps' duties after the cut off date for comparative upgrading. Providing a specific description of an integrated principal's duties, where no inconsistent representation has been made in the application, does not constitute impermissible upgrading.[41] Our examination of District's evidence[42] persuades us that Stamps' duties are not excessively vague. We also find no basis for Hispanic's contention that awarding a moderate preference on the facts of this case would be inconsistent with Commission precedent.[43]

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[38] *See* 94 FCC 2d at 955-57, 975-82, 998-98.

[39] 1 FCC 2d 393 (1965).

[40] 1 FCC 2d at 395.

[41] *See WHW Enterprises, Inc.,* 89 FCC 2d 799 (Rev. Bd. 1982), *appeal docketed,* No. 83-2067 (D.C. Cir. October 11, 1983); *Poet's Seat Broadcasting, Inc.,* 78 FCC 2d 1080 (Rev. Bd. 1980).

[42] *See* summary at 94 FCC 2d 976-77.

[43] *Accord, Nuance Corp.,* 85 FCC 2d 412 (Rev. Bd. 1981).

33. As an additional matter, Hispanic asserts that an examination of its proposed programming demonstrates that it is more sensitive to community needs than District, notwithstanding District's greater integration. Hispanic urges that it is therefore inappropriate to rely on the presumption that an integrated applicant is more sensitive to community needs than a nonintegrated applicant in granting credit. However, the Court of Appeals has condemned such a "functional" approach to integration.[44] The Commission considers proposed programming only under limited circumstances, and Hispanic has failed to make a showing justifying more than the slight preference already noted.[45]

34. Moreover, Hispanic faults the Board for limiting its consideration of Hispanic's minority ownership to a qualitative enhancing factor with respect to integration. Hispanic claims that this approach conflicts with *TV 9, Inc.* v. *FCC.*[46] However, the Commission believes that this approach fully accords with *TV 9.*[47]

C. Diversification[48]

35. Neither District nor Hispanic owns any outside media interests. United owns or controls WINX, Rockville, Maryland; WSID and WLPL(FM), Baltimore, Maryland; WBNX, New York, New York; WMUR-TV, Manchester, New Hampshire; WJMO and WLYT(FM), Cleveland Heights, Ohio; KECC-TV, El Centro, California; KALI, San Gabriel, California; and KSOL(FM), San Mateo, California. The Board therefore accorded District and Hispanic a preference over United.

36. As it does with respect to integration, Hispanic argues that an examination of its programming enhances its diversification advantage in comparison with District. However, as in the case of integration, the Commission may not adopt such a "functional" approach.[49] Accordingly, Hispanic and District must be ranked equally under the diversification criterion, and each deserves a substantial preference over United.

D. AUXILIARY POWER[50]

37. Both the ALJ and the Board accorded District a slight preference over the other applicants for its auxiliary power proposal. None of the parties, dispute this preference. District will therefore receive a slight preference under this criterion.

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[44] *See Committee for Community Access* v. *FCC,* 737 F.2d 74 (D.C. Cir. 1984).

[45] The specialized programming issue has already been discussed. Hispanic did not seek to make the threshold showing necessary to obtain a general programming issue. *See generally Chapman Radio and Television Co.,* 7 FCC 2d 213 (1967).

[46] 495 F.2d 929 (D.C. Cir. 1973), *cert. denied,* 419 U.S. 986 (1974).

[47] *See WPIX, Inc.,* 68 FCC 2d 381 (1978).

[48] 94 FCC 2d at 957-958, 998. *United Broadcasting Co., Inc.,* 86 FCC 2d 452, 453 (1981).

[49] *Committee for Community Access* v. *FCC, supra* note 44.

[50] 94 FCC 2d at 975, 998.

E. HISPANIC'S REPORTING VIOLATION[51]

38. The Board assessed a slight demerit against Hispanic for a violation of the Commission's reporting Rules. The Board held that one of Hispanic's principals had lacked candor in failing to report that he had pleaded guilty to the misdemeanor of giving money to a government employee in return for a larger share of government business. Hispanic does not dispute this demerit. Thus, Hispanic will receive a slight demerit based on this matter.

F. OVERALL COMPARATIVE EVALUATION

39. Because all of the applicants are basically qualified to be Commission licensees, the choice between the applicants turns on their comparative qualifications. The Board and the ALJ found District the preferred applicant, ranked Hispanic second, and United third. In the absence of a renewal expectancy, the Board found that United had no preferences over the other applicants. Both District and Hispanic had substantial advantages over United under the diversification criterion. As between District and Hispanic, the Board found that District's moderate integration preference and slight preference for auxiliary power, outweighed Hispanic's slight preference under the specialized programming issue and its reporting demerit.

40. We affirm the Board's comparative evaluation of District and Hispanic. However, United's comparative status must be reevaluated in light of our disagreements with the Board's findings previously discussed. We find that United is entitled to a renewal expectancy based on its substantial broadcast record compiled during the 1975-78 license term. This renewal expectancy is only slightly offset by the demerit resulting from United's past misconduct. Thus, the comparison between United and District is similar to that involved in *Cowles Broadcasting, Inc.*[52] There, we stated that the purely structural factors of integration and diversification do not generally outweigh the renewal expectancy, because doing so would frustrate the renewal expectancy's function of providing a "competitive spur" to the incumbent's performance and protecting the public from the unwarranted displacement of meritorious service. We also concluded that this result should not be changed because the incumbent had committed misconduct, since the public detriment represented by the misconduct was relatively small compared with the public benefit represented by the licensee's meritorious broadcast record. We find that the same considerations apply here, District's preference for auxiliary power being too slight to affect the outcome of this comparison. In reaching this conclusion, we wish to emphasize our awareness that renewal applications

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[51] *Id.* at 953-55, 982-83, 995. The ALJ considered this matter decisionally insignificant.

[52] *Supra* note 9.

may not mechanically or automatically be granted[53] and, indeed, that this case presents close and difficult questions. United has not been a model licensee. The occurrence of serious broadcast misconduct at United-owned stations raises significant questions about United's qualifications, which have to be taken into account. Nevertheless, on the record before us, we are able to conclude that United has substantially served the needs and interests of its community of license and can be expected to do so in the future. We are also able to conclude that notwithstanding its past problems, United has demonstrated that serious misconduct has not and will not likely occur at WOOK(FM). Thus, in this case, as in *Cowles*, the public interest benefits from the perpetuation of the licensee's meritorious programming outweigh the possible detriment posed by its wrongdoing and the untested paper advantages of the challengers. Under these circumstances, granting United a renewal expectancy and making that renewal expectancy dispositive against the mainly structural advantages of the challengers fully accords with the public interest considerations underlying our comparative renewal policy. Accordingly, we conclude that United's license to operate Station WOOK(FM) should be renewed.

41. ACCORDINGLY, IT IS ORDERED, That the Applications for Review filed October 7, 1983 by United Broadcasting Company and Hispanic Broadcasting Corporation, and the Contingent Application for Review filed October 7, 1983 by District Broadcasting Company ARE GRANTED to the extent indicated herein and DENIED in all other respects.

42. IT IS FURTHER ORDERED, That the Decision of the Review Board, FCC 83R-55, released August 24, 1983 (94 FCC 2d 938 (Rev. Bd. 1983)) IS MODIFIED; that the Application of United Broadcasting Company, Inc. for renewal of its license to operate Station WOOK(FM) (File No. BPH-589) IS GRANTED; and that the applications of District Broadcasting Company and Hispanic Broadcasting Corporation for construction permits (File Nos. BPH-780831AY and BPH-780901AB) ARE DENIED.

43. IT IS FURTHER ORDERED, That the Motion Requesting Chairman Mark S. Fowler to Recuse Himself From This Proceeding filed October 7, 1983 by District Broadcasting Company IS DISMISSED as moot.[54]

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[53] *See, e.g., Citizens Communications Center* v. *FCC*, 447 F. 2d 1201 (D.C. Cir. 1971), *Clarification granted*, 463 F. 2d 822 (D.C. Cir. 1972).

[54] As noted above, Chairman Fowler has not participated in the action taken by this Memorandum Opinion and Order.

DISSENTING STATEMENT
OF
COMMISSIONER HENRY M. RIVERA

RE: United Broadcasting Company, Inc. — WOOK(FM) — Washington, D.C. FM Radio Comparative Proceeding (BC Docket Nos. 80-479/81)

I dissent from the majority's conclusion that United Broadcasting Company, Inc. (United) is the comparatively superior applicant.[1]

At issue is the integrity of the comparative renewal process. Theoretically, the comparative renewal process is supposed to afford an opportunity to challenge the renewal of an incumbent's license. This process has always been fraught with implementation problems. This is so because an inherent tension exists between an incumbent's legitimate renewal expectancy[2] and the required comparative evaluation.[3]

The Commission's process for choosing between an incumbent and a challenger was articulated in the *Cowles* case.[4] Under this process the Commission is supposed to compare the incumbent's probable future performance to that of the challenger to determine which would better serve the public interest. The Commission begins by giving the incumbent a leg-up, so to speak, if the incumbent shows it has had meritorious programming. This leg-up is called a renewal expectancy, and it has been allowed by the Court. *Id.* However, the court was careful to point out that the renewal expectancy was to be but one factor, which must be weighed alongside other relevant public interest considerations.[5] The court further emphasized that "[t]he focus of the renewal expectancy must be prospective . . . it must be used *only to the extent it predicts* that continued service by the licensee will better serve the public interest during the next term". (Emphasis in original)[6]

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[1] My dissent does not address whether United is basically qualified. As explained below, inasmuch as the demerit assessable for past misconduct is clearly egregious enough to render United the least desirable applicant, the question of whether this misconduct rises to the level to compel absolute disqualification is academic.

[2] *FCC* v. *National Citizens Committee for Broadcasting,* 436 U.S. 775, 782, 78-83 n. 5, 805-7, 98 S.Ct. 2096, 2105, 2106 n. 5, 2117-18, 56 L.Ed.2d 697 (1978); *Citizens Communications Center* v. *FCC* (*Citizens*), 447 F.2d 1201, 1213 and n. 35 (D.C. Cir. 1971), *clarification granted,* 463 F.2d 822 (1972); *Central Florida Enterprises* v. *FCC* (*Central Florida I*), 598 F.2d 37, 60 (D.C. Cir. 1978) (Wilkey, J.), *cert. dismissed,* 441 U.S. 957, 99 S.Ct. 2198, 60 L.Ed.2d 1062 (1979). *See also Greater Boston Television Corp.* v. *FCC* (*Greater Boston*), 444 F.2d 841, 854 (D.C. Cir. 1970), *cert denied,* 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971); *Fidelity Television, Inc.* v. *FCC,* 515 F.2d 684, 702 (D.C. Cir.), *cert. denied,* 423 U.S. 926, 96 S.Ct. 271, 46 L.Ed.2d 253 (1975).

[3] *See Ashbacker Radio Corp.* v. *FCC,* 326 U.S. 327, 333, 66 S.Ct. 148, 151, 90 L.Ed. 108 (1945); *Central Florida I,* 598 F.2d at 41-42; *Greater Boston,* 444 F.2d at 851; *Citizens,* 447 F.2d at 1211.

[4] *Cowles Broadcasting, Inc.* (*Cowles*), 86 FCC 2d 993 (1981), *aff'd sub nom. Central Florida Enterprises, Inc.* v. *FCC,* 683 F.2d 503 (D.C. Cir. 1982) (Wilkey, J.), *cert. denied,* 103 S.Ct. 1774 (1983).

[5] *Cowles,* F.2d. at 506.

Admittedly, United has sufficiently meritorious past programming to warrant a renewal expectancy. However, unlike the overwhelming majority of comparative renewal cases, the positive predictive value normally associated with United's renewal expectancy must be substantially diminished because of the serious, past misconduct as well as the continuing misconduct during the renewal period being reviewed.[7] Consistent with the underlying decisions of the Administrative Law Judge and the Review Board, I believe the case before us clearly presents one of those instances where, as the *Cowles* court implied, the incumbent's renewal expectancy alone is insufficient to permit the incumbent to prevail. To find otherwise is unacceptable because it results in the renewal expectancy always being the overpowering thumb on the balance.[8]

United has had an infamously clouded history before this Commission which is directly relevant to the present comparative proceeding. In 1975, because of misconduct this Commission declined to renew the licenses of two United stations WOOK(AM), Washington, D.C., and WFAB(AM), Miami, Florida (hereafter referred to as the AM misconduct).[9] These developments were quite properly recognized in the present proceeding as having a bearing on United's attempt to renew its license for WOOK(FM).[10] In the present proceeding's Supplemental Designation Order[11], the Commission characterized the AM misconduct as:

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[6] *Victor Broadcasting, Inc.* v. *FCC*, 722 F.2d 756, 768 (D.C. Cir. 1983) (Wilkey, J., dissenting opinion).

[7] The Commission's decision to renew reverses the contrary conclusion of both the Administrative Law Judge and the Review Board. "[W]e could not earnestly make an unqualified prediction of future regulatory compliance [by WOOK(FM)] . . . ." *Intercontinetal Radio, Inc.*, San Mateo, California, BC Docket Nos. 81-890/92, (FCC 84R-52) released July 27, 1984 (Rev. Bd. Member Blumenthal) at para. 6.

[8] In *Cowles, supra*, the court cautioned that while the weight of the renewal expectancy is often controlling (the diversification and integration factors being assigned a lesser weight in the comparative renewal process), the renewal expectancy must not degenerate into an irrebuttable presumption in favor of renewal. *Id.*, 683 F.2d at 508. *See Radio Station WABZ, Inc.*, 90 FCC 2d 818 (1982), *aff'd sub nom. Victor Broadcasting, Inc.* v. *FCC*, 722 F.2d 756, 765 (D.C. Cir. 1983) (Wilkey, J. dissenting).

[9] *United Television Co., (WOOK(AM))*, 55 FCC 2d 416 (1975), *recon denied*, 59 FCC 2d 663 (1976), *aff'd sub nom. United Broadcasting Co.* v. *FCC*, 569 F.2d 699 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1046 (1978); *United Broadcasting of Florida (WFAB(AM))*, 55 FCC 2d 832 (1975), *recon. denied*, 60 FCC 2d 816 (1976).

[10] I refer those interested in the history of this proceeding to the Review Board Decision. 94 FCC 2d 938 (1983).

[11] Supplemental Designation Order, *Memorandum Opinion and Order*, 86 FCC 2d 452 (1981).

> ... serious, repetitive, far-flung, and exclusively within its broadcast operations. Significantly [the misconduct] recurred despite repeated administrative measures by this agency.... [T]he track record... suggests that the United organization is either deliberately flouting FCC rules or is irremediably incompetent.[12]

There has been a "continuing and palpable nexus between the discredited WOOK(AM) operation and the current WOOK(FM)".[13] In fact, United made a conscious effort to transfer the people who were directly responsible for the prior AM misconduct (the tainted employees) to the station now in question, WOOK(FM), and they are still in charge. Furthermore, not surprisingly, additional misconduct occurred at WOOK(FM) in 1977 and 1978 (the FM misconduct) for which United was fined $6,000.[14] Like the prior AM misconduct, the FM misconduct was due to lack of proper supervision.[15]

Notwithstanding the fact that: 1) United continued to employ the tainted employees at the FM; and, 2) the subsequent FM misconduct was similar in nature to the AM misconduct, the majority attached minimal importance to the FM misconduct and did not view it as predictive of future broadcast service or regulatory reliability.[16] The majority's conclusion was contrary to the facts, applicable policy and precedent. Even assuming that one subscribes to the thesis that the FM misconduct and the retention of the tainted employees do not warrant an absolute disqualification, the facts here must be considered substantial, negative predictors of future behavior.

In *Faulkner Radio, Inc.*[17], the Commission articulated the analytic construct for evaluating the effect of misconduct at one station on the fitness of the multiple station owner to remain the licensee of its other stations. The construct involves evaluation of three factors: (1) the nature of the misconduct involved, (2) attribution of personal responsibility within the licensee, and (3) the anticipated deterrent effect of the prior license loss.[18] As shown below, the majority, while attempting to reconcile this case with the *Faulkner* paradigm, distorts the record and its analysis to reach its goal of renewing United's license.[19]

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[12] *Id.* at 458.

[13] *Intercontinental Radio, Inc., supra*, at para. 6.

[14] *Notice of Apparent Liability*, (FCC 78-838) November 30, 1978. See 94 FCC 2d at 971-3 (1982) (ALJ); 94 FCC 2d at 942-3 (1983) (Rev. Bd.).

[15] *Supra* notes 9 and 14.

[16] We are usually concerned about the predictive value of a broadcaster's past conduct because in the case of a renewal applicant, the licensee's past broadcast performance "affords the 'best evidence' " of what we can expect from that broadcaster's ability to operate the station in the public interest. *Central Florida, Inc.* v. *FCC*, 598 F.2d 37, 43 (D.C. Cir. 1978) (Wilkey, J.), *cert. dismissed*, 441 U.S. 957 (1979). As we stated in WOOK(FM) Supplemental Designation Order, 86 FCC 2d at 456, "to the extent that patterns of conduct emerge, the predictive value of that record is greatly enhanced."

[17] 88 FCC 2d 612 (1981).

[18] *Id.* at 616.

Addressing attribution of personal responsibility first, my colleagues place great reliance on United's "institution of pervasive remedial measures[[20]] [to mitigate] the fact that principals associated with WOOK(AM) remain associated with WOOK(FM)." (Para. 22). Mitigation was based on the majority's finding that the retention of the tainted employees[21] is not an absolute bar to renewal and that their severance from United is not a prerequisite to finding United comparatively superior. (Para. 22). The majority's reliance is misplaced because such a finding is in conflict with the holding of *Faulkner*[22] where the Commission flatly conditioned the renewal of all of the incumbent's licenses on the continued "total exclusion" of the wrongdoer (a comparatively minor corporate stockholder no longer associated with the multiple owner) from *any* participation in the licensee or its operations.[23]

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[19] *Faulkner* focused upon the *fitness* of the multiple station owner to *remain* the licensee of its other stations — in terms of *basic qualifications.* My colleagues, without explanation, misapply the *Faulkner* paradigm to the *comparative* context. Yet even assuming the appropriateness of that application, the majority's analysis is flawed.

[20] The effectiveness of these "curative" measures and (contrary to the majority at para. 24) the deterrent effect (the third factor specified in *Faulkner*) of the loss of WOOK(AM) and WFAB(AM) are seriously called into question by the occurrence of the FM misconduct subsequent to the institution of the remedial steps. The ALJ found that this subsequent misconduct indicated "a continuing failure of United to clean up its operations as late as 1977 and early 1978. These violations militate against the mitigating effect of the United effort to improve which had begun at least a year earlier." 94 FCC 2d at 992-3 (ALJ).

[21] Notwithstanding the majority's bald assertions that these tainted employees "were not active wrongdoers; rather they were implicated in a failure to supervise station operations" (para. 22), the tainted employees have been characterized as having not only "immediate management responsibility over the illicit operational activities" but also a "direct connective link between the past management at WOOK(AM). . . personally chargeable for the culpable misdeeds" at the several United stations. *Intercontinental Radio, Inc.*, San Mateo, California, BC Docket Nos. 81-890/92, (FCC 84R-52) released July 27, 1984 (Rev. Bd. Member Blumenthal) at paras. 4, 6 and 7. The record, curiously ignored by the majority, more than adequately supports such characterizations: *i2lb[United] did not . . . establish that its current principals and managers had no responsibility for its previous misconduct; it merely asserts in its brief (at 52) that these individuals were not "tied in any way" with the misconduct. [fn. omitted] However, the findings of fact in the WOOK(AM) and WFAB proceedings appear on their face to counter United's latest assertion. A few examples will suffice. First, in the WOOK(AM) case, the Commission did not find that Richard Eaton was personally implicated in the fraudulent schemes or that he intentionally violated rules; rather, the cause was laid primarily to unsupervised local management. *see* 55 FCC 2d at 419-25. Second, United's E. Carlton Myers and Clifton Holland were the highest management officials when the 1969 violations at WOOK(AM) occurred. 55 FCC 2d at 435, 460 (Initial Decision). Indeed, Myers, the former general manager of WOOK(AM) and current general manager of WOOK(FM), was found to have had substantial responsibility over the religious broadcasts on WOOK(AM) that contained the illegal numbers tips. *Id.* at 449. Similarly, Holland, previously WOOK(AM)'s operations manager (*id.* at 460) and now WOOK(FM)'s public affairs director, had primary responsibility for reviewing advertising to ensure that it was not misleading (*id.* at 457), conduct, in part, for which WOOK(AM) was denied license renewal. Finally, Myers and Holland were in charge of ensuring that WOOK(AM)'s power changed on time at sunrise and sunset (*id.* at 478), and the 1969 technical violations at WOOK(AM) included several instances of failure to change power in a timely manner. *Id.* at 429, exception No. 26. Notwithstanding, United proffered no evidence here concerning these individuals that would exonerate them of responsibility for the serious misconduct that occurred at WOOK(AM) while they held the highest managerial roles. [fn. omitted]

Recognizing the unpersuasiveness of their arguments, my colleagues attempt to minimize the significance of the FM misconduct. (Para. 23). As noted at footnote 14 above, even with an attempt by United to cure any past irregularities with greater supervision and training, the Commission found cause to assess United a $6,000 forfeiture for the recurrence of irregularities that are similar in nature to the ones which had occurred at WOOK(AM) whose license was not renewed. Any student of Communications Law knows that the Commission does not issue a $6,000 forfeiture for insignificant violations. Furthermore, as noted at footnote 20 above, the significance of the FM misconduct in this renewal context goes far beyond the degree of seriousness one ascribes to it *post hoc*. The FM misconduct is indicative of a failure of any remedial measures supposedly implemented and reflects a continued absence of any deterrent effect from the prior non-renewal of two broadcast licenses. Overlooking this,

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> In other words, while United now argues that Richard Eaton was *solely and personally* responsible for all of United's previous misconduct, and that WOOK(FM)'s current management (in its previous incarnations) was blameless, the record and prior Commission findings indicate otherwise. In fact, in the WOOK(AM) and WFAB cases, United argued – with some apparent success – that United's misdeeds occurred without the knowledge or intent of Richard Eaton, and that the responsibility, if any, lay with ineffective or careless local managers. *See, e.g.*, 55 FCC 2d at 419-25, 55 FCC 2d at 836-41. In view thereof, a substantial comparative demerit must be assessed here in evaluating United's renewal qualifications for WOOK(FM). . . . [T]he past deficiencies of key officials in WOOK(FM)'s present management do diminish its future reliability. (Emphasis in original)

94 FCC 2d at 945-7 (Rev. Bd.). *See also* 94 FCC 2d at 993-4 (ALJ). Even assuming, *arguendo*, that the AM misconduct by the tainted employees amounted to no more than "failure to supervise station operations", as the majority holds, that finding cannot help but reinforce the Commission's preexisting doubts (as evidenced by the inclusion of an issue regarding the AM misconduct in the Supplemental Designation Order in this case, *Memorandum Opinion and Order*, 86 FCC 2d 452 (1981)) about United's trustworthiness as a Commission licensee.

[22] *Supra* note 17.

[23] *See also Peoples Broadcasting Corp.*, 92 FCC 2d 1303 (Rev. Bd 1983) assessing a *substantial* comparative demerit in an FM proceeding where an official of the applicant was partially responsible for misconduct at an affiliated AM station.

the majority relied upon both the remedial measures and the deterrent effect (loss of two stations is enough) as mitigating factors in United's favor. In my judgment, this FM misconduct is predictive of future supervisory failures by the same officials now in charge at WOOK(FM) who were directly implicated in WOOK(AM) mismanagement.

As I stated above, I believe (as did the Administrative Law Judge and the Review Board) that the record is clear that United's prior and recurring misconduct of a similar nature and retention of the tainted employees at WOOK(FM) substantially minimizes the weight[24] to be accorded United's renewal expectancy.[25] Furthermore, the retention of the tainted employees at WOOK(FM) and the recurrence of misconduct at WOOK(FM) belies the majority's attempt to rewrite in paragraph 23 a separate "broadcast history" for WOOK(FM).[26]

The Commission should have awarded the FM authorization to District Broadcasting Company. District, under the majority's comparative analysis (paras. 30-40), enjoyed a moderate integration preference, a substantial diversification advantage, and a slight preference for auxiliary power over United.[27]

Unfortunately, the majority's decision is yet another testament to the hollowness of the comparative renewal process.[28] After this decision, it is difficult to imagine that an incumbent could ever be ousted. Apparently, my colleagues feel that there is nothing, short of a basic disqualification, that should cause this Commission to overcome a meritorious past programming record. In short, the majority has granted United a renewal expectancy that is precisely that sort of irrebuttable presumption the *Cowles*[29] and *Victor*[30] courts warned against.

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[24] "[W]here there are weights on the scales other than a meritorious record on the one hand, and integration and diversification on the other, the Commission must afford the latter two *some* weight, since while they alone may not outweigh a meritorious record they may tip the balance if weighed with something else. *See Citizens,* 447 F.2d at 1208-09 n. 23." (Emphasis in original). *Cowles,* 683 F.2d at n. 31.

[25] This is not to suggest that a multiple license owner risks unlimited liability because of misconduct at one station. Clearly, logical limits can be drawn within the framework of *Faulkner* and *Cowles. See* 94 FCC 2d at 944-5 (Rev. Bd.).

[26] *See* 94 FCC 2d at 944-5 (Rev. Bd.), *citing RKO General, Inc.* v. *FCC,* 670 F.2d 215, 237 (D.C. Cir. 1981).

[27] This is contrary to the majority's asserted (para. 40) similarity with *Cowles, supra,* 86 FCC 2d at 1009-10, 1017 (1981), where the unsuccessful challenger enjoyed a "slight" credit for integration and a "clear" diversification advantage over the incumbent's renewal expectancy based on substantial service, but diminished by its main studio rule violation, a violation which, when all mitigation factors were taken into account, did not, in my view, rise to the level of seriousness presented here by United's prior and recurring misconduct, *See Cowles, supra,* 683 F.2d at n. 31.

[28] *See e.g., WIOO, Inc.,* 95 FCC 2d 974, 997 (1983) (Dissenting Statement of Commissioner Henry M. Rivera).

I dissent.

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[29] *Supra* note 8.

[30] *Supra* note 8.

Equipment Authorization
Field Disturbance Sensor
Radio Frequency Device, Marketing
Rule Making, Petition for
Rules, Waiver of

Order Granting Limited Wavier of FCC Rules Part 15 adopted for a vehicle collision avoidance system. System employs a low power microwave radar and requires a higher signal than the rules presently allow in order for the device to operate in a satisfactory manner. The subject Order grants the requested wavier to allow manufacture of the system for 2 years, after which time it must comply with the current rules.

Vehicle Radar Safety Systems, Inc.

FCC 85-204

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the matter of Vehicle Radar Safety Systems, Inc. petitions for waiver and amendment of FCC Rules Part 15 for a vehicle collision avoidance system	RM-4840

ORDER GRANTING LIMITED WAIVER

Adopted: April 23, 1985; Released: April 26, 1985

BY THE COMMISSION: COMMISSION PATRICK CONCURRING AND ISSUING A STATEMENT.

Introduction

1. In July 1984, Vehicle Radar Safety Systems, Inc. (VRSS), submitted a petition for waiver of the rules for field disturbance sensors in Part 15, Subpart F, for a vehicle collision avoidance system. VRSS at the same time submitted a petition for rulemaking to codify the provisions requested in its petition for waiver. This Order grants a conditional waiver for the VRSS system and, for the reasons given below, dismisses the petition for rulemaking.

2. The VRSS system is designed to be installed in trucks and automobiles to warn the driver of objects in the vehicle's path in time to take evasive action. The detection of the objects is accomplished through use of a low power microwave transmitter which functions in a manner similar to a radar. The VRSS system is specially designed to measure the speed of closure of other vehicles and objects relative to the vehicle equipped with the VRSS system. The system activates a series of dashboard warning lights and buzzers if the difference in relative speeds indicates the possibility of a collision. The equipment is not designed to warn of possible collisions with vehicles approaching from the side or rear. Further, the device is intended to give warning only within a certain defined range of closing speeds.

Background

3. The low power radar falls within the definition of a field disturbance sensor given in Section 15.4(j),[1] and as such is governed by the requirements in Part 15, Subpart F. These rules specify technical requirements designed to minimize the risk of interference to authorized radio services. Field disturbance sensors must be certificated as complying with the technical requirements as a precondition to marketing. Operation of a field disturbance sensor is subject to the requirement that it must not cause harmful interference to authorized radio services and must accept any interference received.

4. VRSS has designed the transmitter to operate in the frequency range 24,125 MHz ± 50 MHz. Section 15.309(a) specifies that field disturbance sensors operating in this frequency range are subject to a field strength limit of 250,000 microvolts per meter (uV/m) measured at a distance of 30 meters from the equipment. With current technology, the VRSS system requires about 750,000 uV/m, which is about 10 dB more than Section 15.309(a) permits at 24,125 MHz.[2] VRSS claims that without

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[1] Section 15.4(j) defines a field disturbance sensor as a restricted radiation device which establishes a radio frequency field in its vicinity and detects changes in that field resulting from movement of persons or objects within the radio frequency field.

[2] VRSS requests that instead of merely applying a higher field strength limit, the Commission should apply the following technical requirement: "For microwave collision warning systems operating at 24,125 MHz the maximum output power shall not exceed 0.1 watts. The product of output power and beamwidth shall not exceed 63.25." Presumably, power would be in terms of watts and beamwidth in terms of degrees. Although VRSS asserts that this formula is identical to that contained in the Office of Science and Technology Bulletin OST 37, pertaining to doppler radars operating at 24,150 MHz, this assertion is not correct. The bulletin states that the product of output power in watts and antenna gain in terms of power ratio shall be no greater than 63.25. The alternate requirement suggested by VRSS has no clear meaning. Since it is the strength of the field produced by the device which is the determining factor for the risk of interference, we have chosen to interpret the VRSS petitions as requesting an increase in

this increased signal, the system will not detect objects at a far enough distance to provide adequate warning to the driver. However, VRSS speculates that through future advances in component technology and signal processing techniques, it should be able to produce systems that meet the current rules within the next 2 years.[3]

5. The petitions for waiver and rule making were both put on public notice.[4] A list of those parties that filed timely comments and reply comments is given in the Appendix. In view of the similarities between the petition for waiver and petition for rule making, we are considering all the comments together. Some information was submitted concerning the VRSS system after the deadlines for filing comments had passed. For the purpose of having as complete information as possible in this matter, we have also taken these filings into account. A list of the parties that filed information after the deadlines can also be found in the Appendix and the documents have been inserted in the record for the waiver request.

Comments and Discussion

6. Several parties expressed concern about the possibility that the VRSS system may cause interference to police traffic radars or speed meters, which operate in the band 24,050 to 24,250 MHz. VRSS contends that the risk of interference to police radars is minimal due to the unique technical characteristics of the system, such as the following: the signal is highly directional, having a beamwidth of only 6 degrees aimed at the road ahead, and it is unlikely that the major portion of the energy would be aimed in the direction of a police radar; the signal is circularly polarized in the opposite sense of police radar receivers, so that the police radar is less sensitive to the VRSS signal; the type of modulation employed by the system would not produce a speed reading on a police radar; and, there is some offset between the nominal frequencies used by police radars and the nominal frequencies employed by the VRSS system, so that the two systems will not ordinarily be coincident in frequency.

7. Kustom Electronics, a manufacturer of police radars, and Dynascan, a manufacturer of radar detectors, both question the significance of the various factors described by VRSS. For example, they point out that,

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the field strength limit of Section 15.309(a). Measurements made at the Commission Laboratory, discussed later in this document, and measurement data submitted by VRSS, indicate that the system actually emits at a level about 7 dB above the limit. Allowing some tolerance for measurement error and production variances, the petition for waiver is considered to request the equivalent of an increase in the field strength limit to 750,000 uV/m, which is about 10 dB above the limit.

[3] Letter from VRSS dated January 28, 1985.

[4] The petition for rule making was designated RM-4840, and was put on public notice on August 10, 1984. The petition for waiver was put on public notice on September 24, 1984, FCC mimeo number 6793.

where police radars are used around curves in the road, the VRSS signal could, in fact, be directed at the radar. However, because certain of the specific technical details of the system were not disclosed in the petitions, Kustom and Dynascan state that they can only speculate as to whether interference will actually occur. Nevertheless, Kustom emphasizes the importance of maintaining the integrity of traffic radars as a law enforcement tool and opposes the VRSS system in the 24,125 MHz band because it may cast doubt on police radar readings. The International Association of Chiefs of Police shares this concern. On the other hand, several other police organizations submitted comments in favor of the VRSS system, some expressly stating that the system does not pose an interference threat to police radars, although no substantiating information was provided.

8. Concern was also raised in the comments that the VRSS device would cause false triggering of radar detectors. However, it is unclear what would be the detrimental effect of false triggering of radar detectors. In any event, the commenters disregard the fact that radar detectors do not operate as part of an authorized radio service and therefore are not accorded interference protection under the FCC Rules. Some commenters raised concerns about the ability of the VRSS system to tolerate interference from other equipment which perhaps could cause false activation of the warning mechanism. It was suggested that because the system is used for safety purposes it should be treated as a new radio service under which protection from interference could be granted. In essence this would call for an exclusive allocation for these systems. A number of comments were submitted by trucking and bus companies supporting the system as a useful piece of safety equipment.

FCC Laboratory Investigation

9. In order to investigate the risk of the VRSS system causing interference to police radars, tests were performed at the FCC Laboratory in Columbia, Maryland. Several different makes and models of police radars were employed during the tests. The first phase of the investigation was conducted on the highway with the Maryland State Police operating the traffic radars under various typical configurations to observe any anomalies in the performance of the units that could be attributed to the VRSS system. No interference to any of the police radars was detected during the initial road tests. Next, tests were performed under laboratory conditions. Because a laboratory environment allows more precise control of operational parameters such as operating frequency, frequency drift, antenna alignment, etc., it was possible to create interference under certain conditions.

10. Subsequently, tests were performed outdoors on the Laboratory service road in an attempt to duplicate the interference conditions

observed inside the Laboratory building. It was possible, with careful repeated manual adjustment of the frequency of the police radar equipment and precise alignment of the antenna systems, to create an interference condition which caused the display of the radar, which indicates the measured speed, to go blank after establishing a momentary reading. Taking into account environmental conditions, such as temperature variations and road vibrations, which cause the frequencies of both the police radar and VRSS signal to drift under actual operating conditions, and also taking into account the antenna system alignment required, it would be extremely rare for the frequencies and antenna systems to align in the precise manner which caused interference to occur. Also of importance, is that the interference found during these road tests did not yield an erroneous speed reading, but rather a blanking of the radar. In conclusion, taking all factors into account, the probability of the device causing interference to police radars was judged to be negligible. A complete report of this and other findings of the Laboratory is given in FCC laboratory Report in Project No. 2242-22, "Investigation of Vehicle Radar Safety System, Inc. Collision Avoidance Warning Equipment."[5] A copy of the report has been inserted in the record for the petition for waiver.

Commission Decision

11. VRSS's argument that its collision avoidance system would not perform satisfactorily if, using currently available technology, it were designed to satisfy the rules for field disturbance sensors, is reasonable. Further, based on our investigations, it appears that the risk of interference to police radars is negligible, and therefore, will not affect their operation. The fact that the device does not cause interference to police radars indeed appears to be due, in large part, to the unit's unique technical characteristics, and not because a higher signal level can generally be tolerated for other types of field disturbance sensors operating in this frequency band.

12. The question of whether such systems should be provided for in an authorized service or under Part 15, hinges on how such systems will be used and what the consequences might be if the interference occurs. VRSS emphasizes that its request is limited to a warning system. We are not in a position to predict with complete certainty how the driver will react if, for various reasons, including response to other radio signals, the

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[5] In the course of the laboratory investigation it was found that not all police radars utilize left-hand circular polarization as contended by VRSS. (The FCC Rules do not specify the direction of rotation for circularly polarized police radars.) The laboratory tests were performed using some police radars which were left-hand circularly polarized and some which were right-hand circularly polarized. This did not produce any noticeable difference in the results.

system gave a false warning or failed to operate when it should. However, the fact remains that the driver retains control of the vehicle. It seems reasonable to assume that the driver will continue to rely most heavily on direct observations of the road ahead and will exercise judgment in deciding how to react to any warning from the system, or lack thereof. We have consulted with the U.S. Department of Transportation on this issue and it has no objection to permitting introduction of this system to the market.[6] Therefore, at this time we find no compelling reason why steps need to be taken to protect warning systems against interference. On the other hand, if the VRSS system or others are developed to automatically activate the vehicle's brakes, the issue of potential interference takes on heightened importance and the question of whether such systems should operate under Part 15 will have to be examined further.

13. We understand that others may be developing systems similar in concept to the VRSS system, but perhaps utilizing other frequencies and having different technical characteristics. It is unclear what the long term technical requirements will be for these devices with regard to the appropriate frequencies, signal levels, and interference protection required, among other factors. Moreover, in view of VRSS's statement that it believes it could come into compliance with the existing Part 15 Rules within about 2 years, there seems to be little need for long term provisions for its device. In fact, VRSS states that, if its waiver is granted, it sees no need to pursue rule making.

14. It is our objective to permit introduction of new radio technologies as expeditiously as possible. In view of the potential benefits of the VRSS system, and, since there appears to be no significant risk of interference to authorized radio services, we find the VRSS request for waiver to have merit. As to the petition for rule making, for the reasons given above it would be premature to initiate rule making at this time. Therefore, we are dismissing the VRSS petition for rule making. We will, however, continue to monitor developments in this area and, if appropriate, initiate rule making at a later time.

15. In light of the above, VRSS is granted a waiver of the field strength limit in Section 15.309(a) for its collision warning system FCC ID: DT76V21000A, subject to the following conditions:

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[6] The FCC Chief Scientist wrote to the U.S. Department of Transportation on February 22, 1985, requesting viewpoints on the VRSS warning system and the subject petitions. We received a response on March 28, 1985, from DOT, advising that there are no objections to the subject warning system. Although there is concern about the remote possibility that the driver could place undue reliance on the system, no evidence thus far supports this conclusion. However, DOT is much more strongly concerned about systems that might be used to activate the vehicle's brakes and advises against permitting such a system without further study.

(a) The field strength of the emission on the fundamental frequency shall not exceed 750,000 uV/m at 30 meters, measured with a linearly polarized antenna.

(b) This waiver applies only to units manufactured before April 23, 1987.

(c) The waiver is restricted to a warning system and does not extend to a system designed to activate an automatic braking system.

(d) The device shall be certificated as complying with the applicable portions of part 15, Subpart F, except as modified by items (a), (b), and (c).

Ordering Clauses

16. Pursuant to the above and under the authority of Sections 4(i), 302 and 303(r) of the Communications act of 1934, as amended, IT IS ORDERED that VRSS, Inc. is granted a waiver of Section 15.309(a), subject to the conditions listed in the paragraph 15, above. Authority is delegated to the Chief Scientist to grant similar waivers to other manufacturers subject to the same conditions, provided there is similar basis for finding that the equipment will not cause interference to authorized radio services.

17. IT IS FURTHER ORDERED that the VRSS petition for rule making, RM-4840, IS DISMISSED.

18. Pursuant to Section 1.427(b) of part 1 of the Commission's Rules, since it relieves a regulatory restriction, this *Order* shall become effective immediately.

19. For further information concerning this Order contact Mr. George Harenberg or Mr. Julius Knapp, Office of Science and Technology, telephone (202) 653-6288.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

CONCURRING STATEMENT OF COMMISSIONER DENNIS R. PATRICK

In re: Vehicle Radar Safety Systems, Inc. petitions for waiver and amendment of FCC Rules Part 15 for a vehicle collision avoidance system.

This Order grants to Vehicle Radar Safety Systems, Inc. (VRSS) a waiver to market a vehicle collision avoidance system under Part 15 of the Commission's Rules. The system is intended to be sold to motorists to warn them of objects in their vehicles' path in time for them to take evasive action and avoid a collision. I certainly approve of and support the concept of a system that would increase motor vehicle safety. However, I am concerned about the placement of these devices in the spectrum used for police radar.

By this Commission action VRSS is authorized to sell an unlimited number of these systems over the next two years that operate with a field strength three times greater than the present maximum level permitted under Part 15. Because these devices operate in the same spectrum used by the police community for speed control radars, there exists a potential for interference with police operations. I recognize that the Commission's Office of Science and Technology (OST) has conducted tests that indicate the chance of interference to police radar is small. Nevertheless, I share the view expressed by the International Association of Chiefs of Police in its comments opposing the waiver, that even a remote chance of interference is a matter of great concern.

In light of the opposition to the waiver, I would have preferred to explore the use of radar collision avoidance systems in a notice and comment rule making proceeding where alternatives could have been discussed and evaluated. In my view, the Public Notice procedure used in connection with VRSS's waiver request did not provide an adequate means and opportunity for fully exploring this issue, particularly since the Commission is aware of possible detrimental effects on law enforcement activities.

Nevertheless, two mitigating factors persuade me to concur rather than dissent in this action. First, OST's tests of the VRSS system show that the likelihood of interference to police radar is remote. This small likelihood of interference shouldn't, by itself, prevent VRSS's system — which does advance the public interest by improving motor vehicle safety — from being offered. Second, the Commission is granting a waiver for only 2 years. VRSS expects that with developing technology it will be able to comply with the Commission's field strength standards by the expiration of the waiver. Field experience with the system will provide the Commission with the information necessary to reevaluate the potential for interference at that time. However, if during the 2 years interference caused by VRSS's system is higher than anticipated by the OST tests, I will encourage the Commission to reexamine the issue immediately.

Character Qualifications
Diversification of Control of Mass Media
Frequency, Equitable Distribution of under 307 (b)
Official Notice
Ownership and Management, Integration of

Review Board declined to award dispositive Section 307(b) preference in comparative FM broadcast proceeding and awarded grant to applicant with 100% full-time ownership integration proposal enhanced by minority and female status and previous broadcast experience. Slander character demerit assessed against one loser and two applicants' undefined managerial role given only slight integration credit. Official notice not taken of application language omitted from hearing exhibit. Diversification demerit assessed for failure to timely supply exculpatory data.

Voce Intersectario Verdad Amer. Inc.
MM Docket No. 83-765

FCC 85R-44

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of

Voce Intersectario Verdad America, Inc. Las Vegas, Nevada	MM Docket No. 83-765 File No. BPH-811009AH
JaDonn Communications, Inc. Las Vegas, Nevada	MM Docket No. 83-766 File No. BPH-811022AM
Lorraine Walker Arms Las Vegas, Nevada	MM Docket No. 83-767 File No. BPH-820521AL
William H. Hernstadt Winchester Township, Nevada	MM Docket No. 83-768 File No. BPH-820524AW

Appearances

Lewis I. Cohen and *Roy W. Boyce*, on behalf of Voce Intersectario Verdad America, Inc.; *Gary S. Smithwick*, on behalf of JaDonn Communications, Inc.; *Richard J. Bodorff* and *Lester W. Spillane*, on behalf of Lorraine Walker Arms; and *Robert W. Healy*, on behalf of William H. Hernstadt.

DECISION

Adopted: May 20, 1985; Released: May 30, 1985.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL. BOARD MEMBER BLUMENTHAL CONCURRING IN PART AND DISSENTING IN PART WITH STATEMENT.

BOARD MEMBER JACOBS:

1. This proceeding is a precedential companion to *Debra D. Carrigan*, 58 RR 2d 96 (Rev. Bd.), *recon. denied*, FCC 85R-37, released May 6, 1985 (Rev. Bd.). Both cases concern purported communities in the Las Vegas, Nevada Standard Metropolitan Statistical Area, and both examine which one, if any, is the most deserving of a new FM broadcast station operating on a Class C regional channel. Here, presiding Administrative Law Judge Edward Luton (ALJ) concluded that the unincorporated town of Winchester, Nevada had a greater need for its first local transmission service than Las Vegas did for its tenth FM station and its fifteenth aural facility, and he awarded a dispositive Section 307(b) "fair, efficient, and equitable distribution of radio service" preference[1] and the construction permit to the sole Winchester applicant, William H. Hernstadt (Hernstadt). Initial Decision (I.D.), FCC 84D-71, released October 11, 1984.

2. The three Las Vegas applicants — Voce Intersectario Verdad America, Inc. (Voce), JaDonn Communications, Inc. (JaDonn), and Lorraine Walker Arms (Arms) — have filed exceptions and reply briefs, as has Hernstadt. The Board has reviewed the I.D., in light of these pleadings, further supplementary briefs, the oral argument held March 15, 1985, and our examination of the record. As in *Debra D. Carrigan*, *supra*, we decline to award a dispositive Section 307(b) preference here and instead decide the case on the contingent standard comparative issue. We adopt the findings of fact and conclusions of law in the I.D., except as modified herein, and conclude that JaDonn's application should be

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[1] Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §307(b).

granted.[2]

3. *Section 307(b) Issue.* Because the *Debra D. Carrigan* opinions so thoroughly and accurately summarize regnant Commission Section 307(b) policy and case precedent, we need not recapitulate that synthesis here. Suffice it to say that the putative "community" of Paradise, Nevada was denied a Section 307(b) preference in *Debra D. Carrigan* for five reasons, and these same reasons are equally applicable to Winchester in the instant case, viz.: (1) the FM frequency at issue is a Class C regional channel; (2) all the applicants propose "communities" within 5 miles of each other inside the Las Vegas Standard Metropolitan Statistical Area — in fact, in the case of Winchester, the "community" is immediately *adjacent* to Las Vegas; (3) all the applicants stipulated that there is no difference in the geographic areas and populations each proposes to serve; (4) Winchester is not a separate, self-governing jurisdiction providing its own municipal services; and (5) Winchester is not culturally, politically, or economically independent from Las Vegas. *See Huntington Broadcasting Co.*, 5 RR 721 (1949), *reh. denied*, 6 RR 569 (1950), *aff'd*, 192 F.2d 33 (D.C. Cir. 1951), and cases cited in *Debra D. Carrigan, supra*, at 101-103 (the "Suburbanite Model").[3]

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[2] Under the contingent issue, the ALJ offered informal "observations" that the applications of JaDonn and Arms were comparatively "equal". I.D., para. 38 and n. 2. Concluding otherwise, we need not contemplate the vagaries of a broadcast lottery. *See Lottery Selection Among Applicants*, 57 RR 2d 427, 431-32 (1984). With further respect to the ALJ's "observations," we note that in this and other recent I.D.'s involving designated Section 307(b) and contingent comparative issues, *e.g., Las Americas Communications, Inc.*, FCC 84D-83, released December 18, 1984, presiding judges have routinely declined to make conclusions of law under the comparative issue when they believe the case should be decided under the Section 307(b) issue. However, Section 1.267(b) of the Commission's Rules, 47 CFR 1.267(b), requires that I.D.'s contain "findings of fact and conclusions, as well as the reasons or basis therefor, upon *all* the material issues . . . presented on the record" (emphasis added). Indeed, the Commission has long held that "the better procedure" would be to fully resolve the comparative issue. *See Alkima Broadcasting Co.*, 30 FCC 932, 933 n. 2 (1961); *see also WFPG, Inc.*, 33 FCC 673, 678 (1962), and *Sayger Broadcasting Co.*, 32 FCC 493, 496 n. 7 (1962). Where, as here, comparative evidence is adduced in a proceeding, a complete comparative analysis may prove essential if reviewing authorities disagree that the Section 307(b) issue is determinative. Thus, because a full evaluation of the comparative issue would not only provide the benefit of the ALJ's thinking but would also facilitate appellate review at all levels, this practice should be followed in the future. *See RKO General, Inc.*, 61 FCC 2d 1062, 1064, 39 RR 2d 23, 26 (1976).

[3] We need not address Voce's exception to the ALJ's refusal to add a Section 73.1120(a) "community" issue against Hernstadt in Memorandum Opinion and Order, FCC 83M-4386, released November 30, 1983, because, as in *Debra D. Carrigan, supra*, even if we assume *arguedo* — which we — that Winchester *is* a licenseable community under Section 73.1120(a) of the Commission's Rules, 47 CFR 73.1120(a), that determination is not dispositive of the Section 307(b) *preference* question, which we have decided adversely to Winchester. On the other hand, we reject as frivolous on the merits Voce's

4. *Slander Issue.* By Memorandum Opinion and Order, FCC 83M-4386, *supra*, the ALJ added a slander issue against Hernstadt, and a basic qualifications and comparative basis, to inquire into the character implications of a defamation judgment rendered against him by civil jury verdict and affirmed by the Nevada Supreme Court in *Nevada Independent Broadcasting Corp.* v. *Allen*, 99 Nev. 404, 664 P.2d 337 (1983). It appears that on September 11, 1978, on the eve of the Republican gubernatorial primary, candidate William C. Allen appeared on a political question-and-answer program presented by Station KVVU-TV, Henderson, Nevada. At the time, Hernstadt was a Democratic Nevada state senator; he was also general manager, officer, director, and 94% stockholder of the licensee of KVVU-TV and the program's host. Voce Exh. 4, p. 2; Tr. 196-97; March 20, 1985 letter to Review Board filed by Hernstadt. During the course of the program, Hernstadt erroneously alleged that Allen had passed a $697 check with insufficient funds, that this reflected adversely on Allen's ability to handle state funds should he become governor, and that Allen was not "honorable." Voce Exh. 4, p. 2. The Nevada Supreme Court affirmed the jury's finding that Hernstadt had proceeded with "actual malice," noting, *inter alia*, that an attempted "correction" by Hernstadt on the same program in fact amounted to a republication of the slander, that Hernstadt's testimony contained several material contradictions, and that Hernstadt's "good faith belief" in the truth of his comments was "disingenuous." Voce Exh. 4, pp. 12-13. In mitigation of the court's decision and $50,000 judgment against him, Hernstadt testified in this proceeding that "there was neither malice nor slander in the event," that his only purpose was to determine whether the candidate's campaign was in financial trouble and not to embarrass Allen, and that "there had never been a problem like this before" at KVVU-TV. Hernstadt Exh. 5, pp. 1-2.

5. The ALJ concluded that Hernstadt's conduct in this matter was not disqualifying and that, in view of the fact that it was an isolated incident occurring once in a broadcast career spanning more than a decade, no more than a slight comparative demerit was warranted. I.D., para. 33. Hernstadt, Voce, and Arms have excepted to this conclusion. Hernstadt maintains that the ALJ erred in adding the issue because there is allegedly no precedent for considering civil torts as character issues under the comparative criteria. At the other extreme, Voce asserts that Hernstadt should be disqualified because his unrepentant conduct was

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exception to the ALJ's refusal to add a novel and unprecedented Reciprocal Service Doctrine "candor" issue against JaDonn in Memorandum Opinion and Order, FCC 84M-1511, released March 28, 1984. And JaDonn's exception to the ALJ's failure to resolve in the I.D. the reciprocal service issue he added by Memorandum Opinion and Order, FCC 84M-144, released January 13, 1984, is mooted by our Section 307(b) disposition.

broadcast-related, bodes ill as a predictor of future licensee conduct, represented the (mis)use of a broadcast facility for a private rather than a public purpose, and violated the anti-discrimination and equal opportunities letter and spirit of Section 73.1940(c) of the Rules, 47 CFR 73.1940(c), and Section 315 of the Communications Act. In between, Arms believes that Hernstadt's conduct was sufficiently egregious to warrant a substantial demerit but not disqualification.

6. At the outset, we affirm the ALJ's addition of the slander issue. It is well established that the Commission's concern for character-related delicts extends to civil as well as criminal conduct, *Uniform Policy of Violation of Laws*, 42 FCC 2d 399, 403 (1951), and to state as well as federal law, *Central Texas Broadcasting Co.*, 74 FCC 2d 393, 396-97, 46 RR 2d 951, 959 (1979) (issue added to determine whether principals of applicant violated state usury laws). The fact that Hernstadt's tortious conduct violated no state law is certainly immaterial where, as here, the conduct is character-related (actual malice was proven) and broadcast-related. However, we do not believe that a slight comparative demerit adequately measures the seriousness of Hernstadt's misconduct. The public trustee/public interest credentials of a broadcast licensee or new applicant are seriously undermined by conduct suggesting that a broadcast facility is being used to foster a private rather than a public purpose, *Young People's Assoc. for the Propagation of the Gospel*, 6 FCC 178 (1938), and anticompetitive purpose, *Radio KCCT, Inc.*, 68 FCC 2d 744, 43 RR 2d 393 (1978), or a discriminatory purpose, *Discriminatory Programming*, 25 FCC 2d 705 (1970). Where, as here, the conduct arises in the context of a televised pre-election political forum, questions of news slanting or news distortion may also be raised. *See Gross Telecasting, Inc.*, 46 FCC 2d 543 (1974).

7. We recently had occasion in *Focus Television Co.*, 98 FCC 2d 546, 56 FCC 2d 1335 (Rev. Bd. 1984), to emphasize the due deference that should be accorded the substantive legal determinations of tribunals with primary jurisdiction over controversies. In the instant case, we have already noted (paragraph 4, *supra*) the Nevada Supreme Court's conclusions that Hernstadt acted with actual malice in defaming Allen and that his excuses were disingenuous. We must also emphasize that, at the time of this misconduct, Hernstadt was no mere private citizen and/or low-level station employee. Rather he was a Nevada state senator and the station's general manager and 94% owner. He was also a member of the opposite political party from Mr. Allen. Under these circumstances, we perceive a clearly improper private (political) purpose being served by Hernstadt's antics, and his premeditated actual malice and later disingenuousness represent a serious abuse of licensee power and the public trust. Thus, although we are indeed focusing on an isolated incident, when we

take into account the nature and recency of the misconduct, the significance of Hernstadt's role and station position, and the absence of remedial action or contrition,[4] it provides the basis for a highly negative predictive judgment about Hernstadt's future reliability as a Commission licensee. We conclude that Hernstadt should be assessed, at the least, a moderate comparative demerit. *Compare Focus Television Co., supra* (substantial demerit given for recurring fraudulent conveyances and false oaths), *with Country Broadcasting Co.*, 93 FCC 2d 83, 53 RR 2d 293 (Rev. Bd. 1983) (applicant disqualified because of a pattern of intentional deception in the FCC application process).

8. *Diversification of Control.* Under the diversification of control of mass media comparative criterion, the ALJ informally concluded (see footnote 2, *supra*) that Voce deserved a substantial comparative "demerit" because of its failure to permit full exploration of the possible media interest of Voce's 44% owner James C. Gates in Station KMJC, El Cajon, California, with which Gates has an exclusive sales representation agreement. I.D., para. 36. As to Hernstadt, while the ALJ noted that Hernstadt's wife had a 20% interest in Station WKAT, Miami Beach, Florida, which was attributable to Hernstadt, he nevertheless concluded that this interest was too distant to warrant any diversification "demerit." I.D., para. 37. In their exceptions, Voce asserts that it deserves no more than a very slight diversification "demerit" (assuming that a media interest in KMJC is attributed to Gates, which Voce opposes); Hernstadt urges that Voce's application should be dismissed for failure to prosecute because of Voce's failure to produce the KMJC agreement for examination despite the ALJ's explicit request (Tr. 87-89); and Arms maintains that Hernstadt deserves a diversification demerit because of Mrs. Hernstadt's WKAT interest.

9. The Board is nonplussed by Voce's cavalier refusal to supply the missing KMJC agreement from the time the ALJ first requested it at hearing on January 12, 1984 until six days after the Board asked for the document at the March 15, 1985 oral argument. Voce's contentions in its Brief at 29 that it never "refused" to produce the agreement, that it was merely awaiting a formal order by the ALJ, and that it "would have voluntarily provided the document had any party made a request for it" represent procedural gamesmanship and have caused much unnecessary mischief here. We have reviewed the agreement, and it does not appear to contain any interest-attributing provisions, such as making Gates the station's sales manager, *see Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 n. 5, 5 RR 2d 1901, 1908 n. 5 (1965). We

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[4] See *Central Texas Broadcasting Co.*, 90 FCC 2d 583, 592-93, 51 RR 2d 1478, 1485-86 (Rev. Bd. 1982), and *NLT Corp.*, 52 RR 2d 817, 823 (1982), for discussions of the significance of these predictive criteria.

also agree with Voce's position that sales representation *per se* has not heretofore been recognized as a cognizable media interest. But these facts do not excuse Voce's non-cooperation at hearing in response to a legitimate request which Voce did not challenge. While Hernstadt's dismissal "motion" comes too late (it should have been made at hearing), and artificially inflating a diversification "demerit" is not an appropriate means of penalizing Voce's procedural misconduct, we do believe that it is appropriate to infer that the "evidence not produced would be adverse to the party with peculiar access to the evidence," C. Wright & K. Graham, Federal Practice and Procedure §5124 at 587 (1977); *see Blow* v. *Compagnie Maritime Belge (Lloyd Royal) S.A.*, 395 F.2d 74, 79 (4th Cir. 1968), and weigh the too-belatedly-produced KMJC agreement as if it were *never* supplied and *did* warrant media attribution. Having done so, we conclude that, given Gates' 44% ownership interest in Voce, his non-integrated role there, and his worst-case significant managerial role at KMJC, Voce deserves a slight diversification "demerit," which we will assess. *Cf. Reginald A. Fessenden Educational Fund, Inc.*, FCC 85R-7, released January 30, 1985 (Rev. Bd.), para. 6 (very slight diversification "demerit" assessed where unintegrated 11% limited partner would be general manager of two other in-state radio stations); *Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027, 53 RR 2d 1203, and 95 FCC 2d 444 (Rev. Bd. (1983) (grossly dilatory curative amendment rejected), *rev. denied*, FCC 84-119 (Comm'n 1984), *aff'd per curiam sub nom. Royce International Broadcasting Co.* v. *FCC*, Case No. 84-1168 (D.C. Cir. April 30, 1985). As to Arms' exception, we believe that Hernstadt should receive a slight diversification demerit for his 20% attributable interest in a very distant AM station. *See Joseph Bahr*, 92 FCC 2d 114, 52 RR 2d 996 (Rev. Bd. 1982), *modified on other grounds sub nom. Global Broadcasting Group, Inc.*, 94 FCC 2d 809, 54 RR 2d 404 (1983); *Christian Broadcasting of the Midlands, Inc.*, 57 RR 2d 87 (Rev. Bd. 1984).

10. *Integration of Ownership and Management.* Under the ownership integration comparative criterion, the ALJ considered only the full-time quantitative integration proposals of JaDonn, Arms, and Hernstadt in his informal conclusions, recognizing that these proposals were decisively superior to Voce's plan to integrate 51% owner Alfredo Alvarez as general manager on a 30-hour per week basis. I.D., paras. 16 and 36-38. He then eliminated Hernstadt because of the slight comparative demerit he assessed under the slander issue (see paragraphs 4-7, *supra*), factored in qualitative enhancement credits to JaDonn and Arms for minority and female ownership and past broadcast experience, and declared the latter two applicants to be comparatively equal. I.D., para. 38. In this cursory exercise the ALJ fully credited Mr. Hernstadt's and Mrs. Arms' proposed integrated managerial roles despite JaDonn's and Voce's protests.

11. Our integration analysis differs from the ALJ's in several respects. First, we affirm his conclusion that Voce's integration proposal is decisively inferior to that of any of its opponents who have adequately demonstrated full-time (40-hour week) 100% integrated managerial roles. *See Van Buren Community Service*, 87 FCC 2d 1018, 1022, 50 RR 2d 115, 119 (Rev. Bd. 1981), *rev. dismissed*, 50 RR 2d 1433 (Comm'n 1982). Second, we agree that Hernstadt cannot prevail under the integration criterion, but our concern goes beyond the slander demerit that we have assessed, even through such a demerit by itself sufficiently undercuts Hernstadt's integration proposal to make him a loser. *See Focus Television Co., supra* (character demerit diminishes the qualitative aspects of an integration proposal and may, in certain circumstances, diminish quantitative integration credit, too). We also take note that Hernstadt's direct testimony at hearing failed to set forth a specific managerial role and duties at his proposed station. He stated only that he "proposes to spend a minimum of 40 hours per week in the day-to-day operation of the station" (Hernstadt Exh. 3, p. 1). While the record also reveals that Hernstadt had eight years of experience as general manager of Station KVVU-TV, Henderson, Nevada, it shows that at that time, as during the course of this proceeding,[5] Hernstadt was simultaneously serving as a state senator. Tr. 187, 192, 196-97. On cross-examination, Hernstadt provided the following telling description of his managerial *Modus operandi* during this period (Tr. 197 — emphasis added):

> During 1977 when I was in session when I was in the Senate, *I hired a special consultant to watch the store for about four months where I conferred with my phone . . . [D]uring the 1979 session . . . I didn't even need any help . . . I could manage the station by an occasional phone call* once a day or once every other day even though I was in the Senate and I was 400 miles away.

The record further indicates that Hernstadt resides in New York for one month every year. Tr. 191-92. Under these circumstances, we conclude that Hernstadt deserves no more than "slight credit," if any, for his undefined and significantly absentee managerial role. *Compare Deep South Radio, Inc.*, 46 RR 2d 1657 (1980) (slight credit awarded for majority stockholder's undetailed integration proposal), *with Greater Wichita Telecasting, Inc.*, 96 FCC 2d 984, 55 RR 2d 926 (1984) (no credit given for part-time absentee integration), *and Georgia Mountain Corp.*, 57 RR 2d 1020, 1024 (Rev. Bd. 1985) (no credit for part-time integration commitments emphasizing telephone contact); *see Metro Broadcasting,*

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[5] Hernstadt's term as state senator expired in November 1984 (Hernstadt Exh. 3, p. 1), and he did not seek reelection, but during the course of this proceeding he declined to reveal whether he would seek reelection (*id.*). Thus, his integration proposal — at least during the hearing — was inherently uncertain. To avoid comparative upgrading, we must presume that Hernstadt's senatorial duties did not terminate in 1984. *See J.B. Broadcasting of Texas, Inc.*, FCC 85R-32, released April 22, 1985 (Rev. Bd.), n. 3.

Inc., 57 RR 2d 440 (Rev. Bd. 1984) (full-time integration proposal of Florida legislator who will be absent two months per year reduced to part-time), *and Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 950-51, 50 RR 2d 1142, 1147 (Rev. Bd. 1982) (applicant awarded part-time credit only for proposed 40-hour per week management plan involving three to four month vacations each year).

12. Similarly, we see very little probative value in Mrs. Arms' direct testimony that she plans "to move to Las Vegas and devote full time to the operation and management of the proposed station" (Arms Exh. 2, p. 3). Since there was no cross-examination, this sliver of data represents the sum total of record evidence concerning her integration proposal![6] Normally, such a lack of specificity of managerial duties would yield absolutely no integration credit, where less than a majority stockholder is involved, *see High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 428, 55 RR 2d 627, 632 (Rev. Bd. 1983), *rev. denied*, 56 RR 2d 1394 (Comm'n 1984), but here *Deep South Radio, Inc., supra*, again appears to dictate "slight credit" for Arms' 100% ownership integration proposal.[7]

13. We are left with JaDonn's 100% full-time quantitative integration proposal, whereby 49% owner Donald L. Brooks, will serve as the station's general manager and his wife, 51% owner Mrs. Pamela Brooks, will be the station's general sales manager. Their proposal is significantly enhanced by their minority status (100%), Mrs. Brooks' female status (51%), and Mr.

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[6] At oral argument (Tr. 411), counsel for Arms requested that the Board take official notice that, in answer to Question 27 of Arms' FCC Form 301 application, Arms is identified as "100% Owner and General Manager." We deny this request, other than to notice that the statement has been filed with the Commission, *see Nuance Corp.*, 85 FCC 2d 412, 420, 49 RR 2d 147, 154 (Rev. Bd.), *rev. denied*, FCC 81-473 (Comm'n 1981), because the accuracy of the information is disputed, *id.*, the statement has not been tested through cross-examination, *Lincoln Operating Co.*, 6 RR 1388, 1388a (1951), and it is nowhere reaffirmed in Arms' hearing testimony. Indeed, her subsequent and more general "operation and management" language must be regarded — being 20 months later in time — as receding from the earlier specific general manager's role, absent some explanation which Arms did not provide. Thus, this situation is easily distinguishable from *Leflore-Dixie, Inc.*, 57 RR 2d 1155, 1157-59 (Rev. Bd. 1985), in which we held that one applicant's later specific job description was not at variance with the total absence of any description in Question 27 of its application, but refused to permit another applicant to augment its already-specific job descriptions in Question 27 with new titles and duties that varied significantly from the more limited roles previously specified.

[7] Nevertheless, we commend to the Commission our view that *Deep South's* "presumption" of some managerial duties with corresponding slight credit for majority stockholders encourages applicants like Hernstadt and Arms to put forth inadequate integration proposals which do not meet their burdens of proof. In our view it is better policy to base the award of such important credit on specific evidence rather than inferences. *See Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 492, 55 RR 2d 1299, 1304 (Rev. Bd. 1984), *rev. denied*, FCC 85-275 (Comm'n 1985), and *Lewis Broadcasting Corp.*, 11 FCC 2d 889, 898-900, 12 RR 2d 627, 639-41 (Rev. Bd. 1968) (separate statement of Bd. Member Kessler).

Brooks' extensive and varied broadcast experience between 1961 and 1977 (49%). Even without diminishing Hernstadt's and Arms' integration credit, JaDonn would appear to be comparatively superior.[8] However, Voce and Hernstadt vigorously challenge the Brooks' integration proposal as evasive, contradictory, and a sham. They maintain that, despite their job titles, the Brookses either don't know or won't say what their specific duties are and that Mrs. Brooks deserves no manager integration credit at all because she will spend 32-33 hours per week making sales calls, an allegedly non-managerial activity.

14. The attacks on JaDonn's integration proposal are without merit, and we conclude that JaDonn is entitled to a substantial integration preference over its three diminished adversaries. First, the feigned confusion about the nature and interrelationship of the Brooks' duties is quickly resolved by a review of their hearing testimony. There they explain that while Mr. Brooks is the proposed general manager and therefore will supervise his wife in her role as general sales manager, Mrs. Brooks is also president and 51% owner of JaDonn and, as such, has some supervisory capacity over him. Tr. 268-73, 343-45. We do not find this explanation to be unreasonable or inconsistent with the *basic thrust* of Mr. Brooks' deposition testimony, which was used at hearing for impeachment purposes. While cross-examination of Mr. Brooks revealed that he had incorrectly stated certain responsibilities during the deposition proceedings (e.g., Tr. 321, 323) and was "unable to recall" certain proposed managerial interrelationships (Tr. 345-46), we do not believe this cross-examination attained its intended goal — to show that, title or no, Mrs. Brooks was, at least at the time of the deposition, really going to be running the station and Mr. Brooks was to be completely subordinate to her. In any event, it is patently clear (unlike the Hernstadt and Arms integration proposals) that both Mr. and Mrs. Brooks are going to be involved full time in managerial roles, whether or not the precise division of all responsibilities has been settled. *See Minority Broadcasters of East St. Louis, Inc.*, 56 RR 2d 275, 280 (Rev. Bd. 1984) (full credit given for managerial duties with some overlapping responsibilities). As to the claim that Mrs. Brooks' sales duties are non-managerial and will take up the bulk of her time, we note that she testified that she would supervise a sales staff of two to three persons (Tr. 268) and that her 32-33 hours her week of field work would only be "initially" and would involve "learning

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[8] JaDonn's substantial enhancement credit for minority status and moderate credits for female ownership and broadcast experience exceed Hernstadt's substantial local residence, past civic participation, and broadcast experience credits (as diminished by his significant slander demerit) and Arms' substantial female and broadcast experience credits. *See Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 55 RR 2d 991 (Rev. Bd. 1984), *rev. denied*, 57 RR 2d 1594 (Comm'n 1985).

the market" (Tr. 278-79) as well as direct sales. The position of sales manager is recognized as a managerial job by the *Policy Statement, supra,* and has been accorded full integration credit on a number of occasions, even when significant sales activities have accompanied the sales supervision. *E.g., Old Time Religion Hour, Inc.,* 95 FCC 2d 713, 726, 54 RR 2d 989, 998 (Rev. Bd. 1983), *rev. denied,* FCC 85-104 (Comm'n 1985); *MTF Enterprises,* 56 RR 2d 1451, 1453 (Rev. Bd. 1984); *Debra D. Carrigan, supra,* at 109. Full credit for Mrs. Brooks' activities as described is warranted.

15. *Final Comparative Evaluation.* All exceptions having decisional significance have been considered by the Board. JaDonn and Arms have both received slight diversification preferences over Hernstadt and Voce, and JaDonn has been awarded a substantial ownership integration preference over its three competitors. Hernstadt's slander demerit further seals his lackluster finish. JaDonn is the clear winner, and we conclude that grant of its application would best serve the public interest, convenience, and necessity.[9]

16. ACCORDINGLY, IT IS ORDERED, That the application of JaDonn Communications, Inc. (File No. BPH-811022AM) for authority to construct a new FM broadcast station at Las Vegas, Nevada IS GRANTED, and the applications of Voce Intersectario Verdad America, Inc. (File No. BPH-811009AH), Lorraine Walker Arms (File No. BPH-820521AL), and William H. Hernstadt (File No. BPH-820524AW) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

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[9] Because of this result, we need not rule on the exceptions to the ALJ's refusal to make findings and conclusions on the issue inquiring into the impact of the San Marco Broadcasting Co. proceeding (Docket No. 20630) on Voce's basic or comparative qualifications. In a Supplemental Initial Decision therein (FCC 83D-73, released January 4, 1984), the ALJ assessed a comparative demerit against an applicant because of 65% owner James C. Gates' conduct — Voce's 44% owner; however, the proceeding was terminated by settlement in *George E. Cameron Jr. Communications (KROQ),* 56 RR 2d 825 (1984), without final action being taken on exceptions to the demerit.

Statement of Board Member
Norman B. Blumenthal
Concurring in Part; Dissenting In Part

With the exception of the matter addressed below, I concur with this decision, especially the assessment of a comparative demerit against William H. Hernstadt for his malicious abuse of his licensing privilege at his station KVVU-TV. The law is solid in holding that licensees are "fiduciaries of a great public resource" and must "satisfy the *highest* standards of character commensurate with the public trust that is reposed in them." *RKO General, Inc.* v. *FCC,* 670 F.2d 215, 232 (1981) (emphasis added; *quoting* FCC decision), *cert. denied,* 456 U.S. 927 (1982). It is difficult to conceive of a more fundamental and egregious abuse of that public trust than Hernstadt's flagrant and partisan libel of a political rival on his own television station; should his abuse ever be repeated, his basic qualification to be a licensee should be considered utterly forfeit.[1]

On a much more pedestrian plateau, I cannot join the decision's determination that the integration credit of Lorraine Walker Arms should be minimized for "lack of specificity." *Ante* para. 12. She clearly specified on her application form (FCC Form 301) that she would be the stations's "General Manager," *id.*, and reaffirmed her clear commitment at hearing, *see id.* So obvious was her intent that she was not even cross-examined on her integration proposal by her opponents, *see id.* Yet, the Board majority is dissatisfied, ostensibly seeking more "specificity." Inasmuch as our legal touchstone, the *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965) uses the identical term ("General Manager") to describe acceptable management duties, *see id.*, at 395, Ms. Arms could hardly have been more "specific."[2] Having used the term to describe general station duties, the Commission is obviously aware of its meaning; and it would seem to suffice for an applicant that *it* meant what *we* meant when using the same commonplace term. It is not clear just what sort of catechism the majority would have an applicant recite when a commonly recognized job title (*e.g.*, Chairman, Federal Communications Commission) is specified, particularly one expressly recognized and long understood by the Commission, *Policy Statement, supra*, and not even questioned by the adversaries. We have accorded full integration credit for proposals far less "specific" and at least as "vague." *See, e.g., LeFlore-Dixie, Inc., supra* note 2, 57 RR 2d at 1158-1159 (paras. 7-8); *Minority Broadcasters of East St. Louis, Inc.*, 56 RR 275, 280 (para. 7) (Rev. Bd. 1984), *aff'd*, FCC 85-131, released March 22, 1985 (Comm'n).

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[1] In affirming the jury verdict, a unanimous Nevada Supreme Court held that, by "clear and convincing evidence," Hernstadt, at the time a Nevada state senator as well as a TV licensee, was culpable of "actual malice" in slandering a political adversary appearing on Hernstadt's television show. *Nevada Independent Broadcasting Corp.* v. *Allen,* 664 P.2d 337, ____ - ____ (1983). Indeed, so arrogant was Hernstadt that — after an apology was demanded for the initial slander during a program break — Hernstadt got back on the air and maliciously slandered the candidate again. *See id.*, at ____ This is certainly not to suggest that any and every libel finding against a licensee would raise similar questions; journalism is, after all, a risky craft, and the publication of defamatory material is, alas, part of the territory. But, when a licensee principal personally and willfully uses his broadcasting facility for improper political purposes, the Commission must move with firmness and finality. *See generally Star Stations of Indiana, Inc.*, 51 FCC 2d 95 (1975) (five licenses not renewed, in part, for political abuses), *aff'd mem.*, 527 F.2d 853 (D.C. Cir. 1975), *cert. denied,* 425 U.S. 992 (1976).

[2] Fortunately, the majority did not base its determination on the meaningless dictum that the actual application form is not part of the "record" of the case. Apart from the fact that it is upon those very applications that we herein act,official notice of the data in the application is, in any event, appropriate. 5 U.S.C. §556 (e); *LeFlore-Dixie, Inc.*, 57 RR 2d

In fact, in this very case, the JoDonn principals proffered blatently contradictory descriptions of their alleged management duties[3]; at times during the hearing, that applicant's dual principals appeared to have all the appreciation of their prospective duties and responsibilities that one might expect from Madonna in an Orioles uniform. Despite their inconsistencies and vagueness, *their* integration proposal was fully credited. *Ante* para. 14.

Thus, the treatment of this matter in the decision appears both unreasonable and arbitrary. *Compare LeFlore-Dixie, Inc., supra*, at paras. 7-8. In that regard, I respectfully dissent.

1155, 1157-1158 (Rev. Bd. 1985) (application for review pending); *Coastal Bend Family Television, Inc.*, 94 FCC 2d 648, 649-650 (Rev. Bd. 1983) (application for review pending).

Insofar as representations made on the (former) FCC Form 301, it appears that the Board may be the source of the problem in holding that Question 27, Section IVA of the form did not encompass an applicant's integration proposal; that question required "that the applicant state 'name[s] and position of the person[s] who determines the day-to-day programming, makes decision, and directs the operation of the station,' and whether they are employed full-time in the operation of the operation of the station." *See Gainesville Media, Inc.*, 72 FCC 2d 807, 817 (Rev. Bd. 1978) (concurring statement). If that question were not originally intended to elicit the integration proposal, we would have to infer that it was posited solely as a result of idle curiosity. Refusing to draw so preposterous an inference, and cognizant that the Commission generally demands that an applicant's proposal be laid bare and frozen at the pre-hearing stage, *see generally Belo Broadcasting Corp.*, 68 FCC 2d 1313, 1320 (1978) ("the applications should be finalized in advance of the start of the actual hearing"), I would require an application to set forth the integration proposal, there and then, so as to eliminate the uncertainties and chicaneries that have arisen recently. *See, e.g., Northern Sun Corp.*, FCC 85R-42, released May 9, 1985 (Rev. Bd.) (application for review pending). I am aware that Question 27, *inter alia*, has been eliminated on the current Form 301. But, as noted before, this helps make the form grossly deficient, and revision would be appropriate so that integration proposals are not susceptible to later upgrading, shading, and endless litigative debate.

[3] *See, e.g.*, Arms Exceptions at 17-21; Voce Intersectario Exceptions at 22-25.

FCC 84D-71

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of

Voce Intersectario Verdad America,. Inc. Las Vegas, Nevada	MM Docket No. 83-765 File No. BPH-811009AH
Jadonn Communications, Inc. Las Vegas, Nevada	MM Docket No. 83-766 File No. BPH-811022AM
Lorraine Walker Arms Las Vegas, Nevada	MM Docket No. 83-767 File No. BPH-820521AL
William H. Hernstadt Winchester Township, Nevada	MM Docket No. 83-768 File No BPH-820524AW

For Construction Permit

Appearances

Lewis I. Cohen, Esq., and *Roy W. Boyce, Esq.*, on behalf of Voce Intersectario Verdad America, Inc.; *Gary Smithwick, Esq.*, on behalf of JaDonn Communications, Inc.; *Robert J. Rawson, Esq., Frank U. Fletcher, Esq., Dan J. Alpert, Esq., Lester W. Spillane, Esq.*, on behalf of *Lorraine Walker Arms; Robert W. Healy Esq.*, and *Robert D. Roadman, Esq.* on behalf of William H. Hernstadt; and *Stephen Yelverton,Esq.*, on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: October 5, 1984; Released: October 11, 1984

Preliminary Statement

1. This is a comparative broadcast proceeding involving the mutually-exclusive applications of Voce Intersectario Verdad America, Inc., JaDonn Communications, Inc., and Lorraine Walker Arms, all proposing service to Las Vegas, Nevada, and that of William H. Hernstadt proposing service to Winchester, Nevada. The issues, as set out in the Hearing Designation Order, are as follows:

> 1. To determine with respect to the following applicant(s) whether, in light of the evidence adduced concerning the deficiency set forth above in paragraph 8, the applicant(s) is financially qualified: Arms[1]
>
> 2. To determine: (a) the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934 as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.
>
> 3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.
>
> 4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

2. By *Order* FCC 83M-4385, released November 30, the following issue was added:

> To assess the impact of the resolution of the issues in the San Marco Broadcasting Company case, Docket No. 20631, File No. BPH-9253, upon the basic and/or comparative qualifications of Voce Intersectario Verdad America, Inc., to be a Commission licensee.

3. By *Order* FCC 83M-4386, released November 30, 1983, the following issue was added:

> To determine the effect of the decision of the *Nevada Supreme Court in Nevada Independent Broadcasting Corp.* v. *Allen* on William H. Hernstadt's basic and/or comparative qualifications to be a Commission licensee.

Finally, by *Order* released January 13, 1984, FCC 84M-144, a "reciprocal service" issue was added.

Findings of Fact

Section 307(b) Issue

4. According to the 1980 U.S. Census, the population of Las Vegas, Nevada was 164,674. Las Vegas has nine FM, five Am (Hernstadt Ex. 6) and four television stations licensed to it (JaDonn Ex. 8). Winchester, Nevada, is located immediately adjacent to Las Vegas. According to the 1980 U.S. Census, it had a population of 19,728. Winchester has no AM, FM, or television station licensed to it. All applicants in this proceeding would provide city-grade (70 dbu) service to the entire areas of the City of Las Vegas and the Town of Winchester. The parties stipulated that there were no substantial differences in the coverage proposed by each of them (Tr. 145).

5. Winchester is an unincorporated town created by the Clark County Board of County Commissioners on April 23, 1951. Prior to that time,

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[1] This issue was resolved in Arms' favor by *Memorandum Opinion and Order,* FCC 83M-3910, released October 21, 1983.

Winchester was part of Paradise, Nevada. In 1978, the City of Las Vegas sought to annex Winchester but in a required referendum, the people of Winchester voted against annexation and it was avoided.

6. An unincorporated town is a political subdivision in Nevada. Winchester's governmental structure consists of an advisory board whose members are appointed by the Clark County Commissioners, and who meet periodically to address issues relating to the health, safety and well-being of Winchester residents. Recommendations of the advisory board are forwarded to the Clark County Board of County Commissioners.

7. Since 1970, the Bureau of the Census has recognized Winchester as a separate census entity (Hernstadt Ex. 1). There are 9,525 households there; 14.9 percent of Winchester's residents are under the age of 18 years, 70.5 percent are between the ages of 18 and 64, and 14.6 percent are over the age of 64. The per capita income is $11,597 and the median household income is $16,990.

8. Clark County or county-controlled organizations provide many services to residents of Winchester as well as to the residents of Las Vegas (Hernstadt Ex. 1). Taxes collected from resident of Winchester are paid to the county. Water is provided by a regional water district. Sewage collection, treatment and disposal are provided by the county. Fire protection is provided by the county; police service is provided by the Metropolitan Police Department which serves the City of Las Vegas, the unincorporated towns and other areas of the county. Public schools are administered by the county.

9. The Town of Winchester is served by the Clark County Library District. The Clark County Health District provides for health services throughout Clark County. There are two hospitals in the Town of Winchester — Sunrise Hospital (661 beds) and Women's Hospital (57 beds). The Clark County Parks and Recreation Department provides recreation services in unincorporated Clark County and in the towns. In sum, many of the services provided by the county in Winchester are also provided by the county in the City of Las Vegas (Hernstadt Ex. 1).

10. Many of the people who reside in Winchester also work there (Tr. 244). A portion of the Las Vegas "strip" of hotels passes through Winchester. This is the series of gambling establishments for which Las Vegas is known (Tr. 242-43). The Convention Center, one of the largest in the western part of the United States, is located in Winchester, along with a number of commercial establishments (Tr. 245).

"Reciprocal Service" Issue

11. Given the existing state of the law, (*See, Kaldor Communications, Inc.*, FCC 84R-26, released April 24, 1984), no findings will be made concerning this issue.

San Marco Broadcasting Company Issue

12. This issue was added to assess the "impact" of the "resolution" of the issues specified in Docket No. 20631 against an applicant (San Marco Broadcasting Company) of which Voce principal James C. Gates is a principal. The San Marco issues concerned the use by Mr. Gates of improper promotional material as the licensee of KLRO(FM), San Diego, California, and as sales representative for KMJC(AM), El Cajon, California. The San Marco application (Docket No. 20631, File No. BPH-9253) was dismissed by *Commission Memorandum Opinion and Order* FCC 84-367, released August 1, 1984, pursuant to an approved settlement agreement. Thus, there has been, and will not be, any "resolution" of the issues there which could have any "impact" on the present proceeding.

Slander Judgment Issue

13. An issue was added to determine the effect of the decision of the *Nevada Supreme Court in Nevada Independent Broadcasting Corporation* v. *Allen* on Hernstadt's qualifications. A jury verdict and judgment of $675,000 was awarded to one William C. Allen, a candidate in the Nevada primary seeking the gubernatorial nomination. The jury found that Hernstadt had slandered Allen during a 1978 broadcast on KVVU-TV, Las Vegas, Nevada, the licensee of which was a corporation controlled by Hernstadt.

14. Allen's advertising agency had purchased time on Hernstadt's station using a check that was returned for insufficient funds. On the eve of the primary, Hernstadt's station ran a program for the primary candidates, including Allen. During the course of this program, Hernstadt alleged that Allen himself had passed a check with insufficient funds, and that this reflected adversely on Allen's ability to handle state funds should he become governor (Voce Ex. 4). It was determined that Hernstadt's on-the-air allegation that a candidate issued a "bounced check" was defamation *per se.* The Supreme Court of Nevada affirmed the slander judgment but set damages at $50,000.

Contingent Comparative Issue

Voce Intersectario Verdad America, Inc.

15. Voce is a corporation owned by Alfredo Alvarez (51 percent), James C. Gates (44 percent), and Juanita H. Landon (5 percent). Alfredo Alvarez is voce's president and a director; James C. Gates is vice-president and a director; and Juanita H. Landon is secretary-treasurer and a director.

16. Mr. Alvarez is the only principal of Voce proposed to be involved in the day-to-day operation of the proposed station. He would serve as the

station's general manager, working on a part-time basis of 30 hours per week (Voce Ex. 1).

17. Mr. Alvarez is a Hispanic-American born in New York City in 1929. He has been a professional musician since he was 16 years old. From 1951 to 1953, Mr. Alvarez served in the U.S. Army.

18. In 1956, Mr. Alvarez moved to Las Vegas where he has resided continuously since that time. During the period from 1957 to 1959, he held a full-time position as a musician at the Tropicana Hotel in Las Vegas. In 1965, he formed his own orchestra which performed at the Silver Slipper, a casino in Las Vegas. In 1965, Mr. Alvarez formed the A/A Music Corporation. In 1967, he became the Music Director at the Frontier Hotel in Las Vegas, and still serves in that capacity. Since residing in Las Vegas, Mr. Alvarez has taught voice and woodwind instruments and has arranged music.

19. This record does not show that any Voce principal has an interest in any other medium of mass communications. However, Voce has refused to permit the matter to be fully explored. Voce principal James C. Gates is the sole stockholder of J.C. Gates & Company (Tr. 97), a company which represents religious broadcasters by selling air time on over 40 stations. Gates was the sole representative for KMJC, El Cajon, California, pursuant to an agreement dated September 26, 1980, and effective October 1, 1980. KMJC is licensed to Lee Bartell and Associates. In attempting to raise a question at hearing concerning the existence of an indirect media interest which would matter under the diversification criterion, extensive cross-examination was conducted of Mr. Gates concerning the agreement between Gates and Bartell. As matters developed, Mr. Gates testified that his responses to the examination had been based on another agreement that he had in mind, one which superseded the October 1, 1980 agreement on which the cross-examination was based. Voce was directed to produce this latter agreement (Tr. 88). It has never done so.

JaDonn Communications, Inc.

20. JaDonn is a Nevada corporation owned by Mr. Donald L. Brooks (49 percent) and his wife Pamela B. Brooks (51 percent). Pamela Brooks is president, treasurer and a director of the corporation. Donald Brooks is executive vice president, secretary and a director of the corporation. Dorothy Wells is a director. Pamela Brooks and Donald Lawrence Brooks are Black Americans, presently residing in Los Angeles, California (JaDonn Ex. 1).

21. Mrs. Brooks proposes to be employed full-time (a minimum of 40 hours per week) in the day-to-day operation of the proposed station as general sales manager. Donald Brooks proposes to be employed full-time

(a minimum of 40 hours per week) in the day-to-day operation of the proposed station as the general manager.

22. Pamela Brooks was born February 22, 1953, in New Orleans, Louisiana. She holds a bachelor of science degree in business administration from Lindenwood College. She began her business career in 1975 as a sales representative for the Xerox Corporation in New Orleans, Louisiana. In 1977, she was a substitute teacher in the Flint, Michigan, public school system. Later, in 1977 and 1978, she was personnel investigator for the General Motors Parts Division in Flint, Michigan. In 1979, she was employed as assistant to the creative director of the Motown Record Corporation, Los Angeles, California. Later in 1979 and in 1980, she was employed as an employee relations assistant with 20th Century Fox Film Corporation in Los Angeles. in 1980 she became Director, Administration and Finance, of the Los Angeles Brotherhood Crusade, Black United Fund, Los Angeles, California. From October to December 1975, she was an air personality on WBOK, New Orleans, Louisiana.

23. Donald Brooks was born April 28, 1941, in St. Louis, Missouri. He was an air personality at WBBR, East St. Louis, Illinois, in 1961 and 1962. He was also employed as an air personality at the following radio stations during the times indicated: WOBS, Jacksonville, Florida, 1963; KATZ, St. Louis, Missouri, 1961-1965; WCHB, Inkster, Michigan, 1965-66; WDAS, Philadelphia, Pennsylvania, 1966-68. In 1968, he was employed by KATZ, St. Louis, Missouri, where he progressively held the positions of air personality, music director and program director until 1973. From 1973 to 1976, he was operations manager for WLOK, Memphis, Tennessee, and WBOK, New Orleans, Louisiana. In 1975, for a brief time, Mr. Brooks was employed as operations manager for KKSS-FM, St. Louis, Missouri. From 1976 to 1977, Mr. Brooks was employed as operations manager for WAMM, Flint, Michigan.

24. Pamela Bakewell Brooks and Donald Lawrence Brooks have no ownership interest or office with any radio and/or television station, newspaper, cable television system, or other medium of mass communication (JaDonn Ex. 4).

Lorraine Walker Arms

25. Mrs. Arms is a native of Lewiston, Montana, and a resident of Reno, Nevada. She will move to Las Vegas and will devote fulltime to the operation and management of the proposed station (Arms Ex. 2).

26. She began her broadcasting career in 1965 with KFBB, Great Falls, Montana. In 1966, she took a sales job with station KCBN, Reno, Nevada, from which she was successively promoted to sales manager and then general manager within a period of a year. She acquired control of the licensee of KCBN in 1971, activating its sister station KRNO-FM in

1974. Both of these stations were sold in March of 1982. She at present has no other broadcast interest (Arms Ex. 2).

27. Mrs. Arms was the recipient of the Reno Ad Club's "Ad Man of the Year Award" in 1971 (the first woman so chosen), and its first woman president in 1972. She served on the Advisory Council for the College of Business, University of Nevada, on the Small Business Advisory Council, and the State CETA Board. She was the first woman president of the Nevada Broadcasting Association, and recipient of the "Broadcaster of the Year" award in 1977.

William H. Hernstadt

28. Mr. Hernstadt is a resident of Winchester, Nevada. He is a member of the Nevada State Senate, with a term expiring in November, 1984 (Hernstadt Ex. 3). He proposes to spend a minimum of 40 hours per week in the operation of the proposed station.

29. Mr. Hernstadt is past president and a director of the Jewish Federation of Las Vegas. He is a representative from Winchester to the Clark County Democratic Committee; a member of Saints and Sinners (a social and charitable organization), and a member of B'Nai B'Rith (Herstadt Ex. 3).

30. Mr. Hernstadt was an officer, director, and majority stockholder of Nevada Independent Broadcasting Corporation, licensee of KVVU-TV, Henderson, Nevada, from 1971 to 1979. He was responsible for the overall operation of the station. Hernstadt sold KVVU-TV in 1979 (Hernstadt Ex. 3). Hernstadt is the sole stockholder of Hernstadt Broadcasting Corporation, licensee of WKAT(AM), Miami Beach, Florida, which he has proposed in a timely manner to divest (Hernstadt Ex. 2). Station WKAT(AM) was acquired in 1979. Hernstadt's wife previously owned 20 percent of WKAT(Tr. 191). By amendment filed December 7, 1983, Hernstadt reported his purchase of his wife's interest in WKAT. However, this was after the cut-off date for amendments as of right. Mrs. hernstadt had made no proposal prior to the cut-off date (September 30, 1982) to divest herself of her interest in WKAT.

Auxiliary Power

31. Each of the four applicants herein proposes to acquire and install an auxiliary generator so as to enable continuous operation during power failures (Voce Ex. 1; JaDonn Ex. 6; Arms Ex. 3; Hernstadt Ex. 4).

Conclusions of Law

32. The financial issue designated the Arms application has been disposed of on a motion for summary decision (*See, Order* FCC 83M-3910), released October 21, 1983). The "reciprocal service" issue is rendered moot by virtue of the Review Board's decision in *Kaldor Communica-*

tions, Inc., supra. The San Marco Broadcasting Company issue can be of no effect because of the dismissal of San Marco's application, Docket No. 20631, File No. BPH-9253, pursuant to an approved settlement agreement.

33. The *Nevada Independent Broadcasting Corporation* v. *Allen* issue was specified on a basic and comparative basis. The evidence concerning this issue raises no substantial question regarding Hernstadt's basic qualifications. There is no doubt that the facts recited in *Independent Broadcasting Corporation* v. *Allen*, supra, did occur. However, the incident appears to have been an isolated one, occurring once in a broadcast career spanning more than a decade. The facts of the incident would be worth no more than a slight demerit if this case was to be decided on comparative grounds.

Section 307(b) Issue

34. Under 47 U.S.C. Section 307(b), the Commission must distribute licenses among communities so as to provide a fair, efficient and equitable distribution of radio service. Where mutually-exclusive applicants, as here, propose to serve different communities, it becomes a question of community need without regard to the comparative qualifications of the applicants. *See Beaufort County Broadcasting Company*, 54 RR 2d 923 (Rev. Bd. 1983). Any of the three Las Vegas applicants would bring a 15th aural service to Las Vegas, Nevada, while Hernstadt — the Winchester applicant — would bring a first transmission service to Winchester, Nevada.

35. The Las Vegas applicants argue generally that Winchester is a place essentially indistinguishable from Las Vegas. But Winchester is a recognized political subdivision of the State of Nevada. The fact that its only governmental structure consists of an advisory board, and the fact that Winchester is dependent (as is Las Vegas) on Clark County or county-controlled agencies for the provision of many basic services to its residents, are of no moment. On the record evidence here, and consistent with Commission precedent, there is no doubt that Winchester is a community deserving of a station assignment. *See, Seven Locks Broadcasting Company, et al.*, 37 FCC 82 (1964) at 84 fn. 1. The Section 307(b) evidence establishes that Winchester, Nevada has a greater need for a first local transmission outlet than does Las Vegas, Nevada for its 15th such outlet. Consequently, a fair, efficient, and equitable distribution of radio facilities under 47 U.S.C. Section 307(b) requires a grant of William H. Hernstadt's application.

Contingent Comparative Issue[2]

36. Voce receives integration credit for the part-time integration of its 51 percent owner Alfredo Alvarez. Voce's refusal to permit further exploration of the possible media interests of its principal James C. Gates garners for it a substantial demerit under the diversification criterion.

37. JaDonn, Arms, and Hernstadt are entitled to 100 percent quantitative integration credit.[3] Of the three, only Hernstadt is chargeable with a media interest. His wife owned a 20 percent interest in WKAT-TV, Miami Beach, Florida, as of the comparative cut-off date concerning which no divestiture promise had been made as of that date. That interest is attributable to Hernstadt. *Angeles Broadcasting Network,* FCC 84R-2, released January 16, 1984. This interest (since divested), in a station in the well-served Miami, Florida market, far away from the proposed service area, is not worth any sort of diversification demerit. Hernstadt does receive a slight demerit under the slander judgment issue.

38. JaDonn's 100 percent integration is qualitatively enhanced by the minority status of its two owners, and by the past broadcast experience of one of them. Arms' 100 percent integration is qualitatively enhanced by virture of her female status and her past broadcast experience. Thus, on comparative grounds, the two superior applicants are JaDonn and Arms, and those two are comparatively equal.

39. Hernstadt's application for Winchester is preferred under the Section 307(b) issue. Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with the provisions of Rule 1.276(d)[4], the application of William H. Hernstadt for a new FM station at Winchester, Nevada, IS GRANTED, and the competing applications of Voce Intersectario Verdad America, Inc., JaDonn Communications, Inc. and Lorraine Walker Arms, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

EDWARD LUTON, *Administrative Law Judge*

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[2] Since Section 307(b) is dispositive of this case, comparative conclusions are not required to be made. Nevertheless, the following observations are offered.

[3] JaDonn and Voce attempt to make much of the fact that the Arms and Hernstadt integration proposals do not spell out the specific duties that Arms and Hernstadt will perform. Each of those principals is a sole proprietor, and each is committed to working at the station on a fulltime basis. In these circumstances, the presiding officer has no difficulty in concluding that Arms and Hernstadt are proposed to be involved in managerial roles.

[4] In the event exceptions are not filed within (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its public release pursuant to Section 1.276(d).